(16,667.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 454.

JOHN D. WILCOX, APPELLANT,

vs.

THE EASTERN OREGON LAND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
E. I. MESSINGER, Defendant.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Stipulation as to Printing of Record.

The bills, answers, decrees, assignments of errors and all
2 the other papers and proceedings in the above-entitled causes being exactly alike, with the exception that in the case of The Eastern Oregon Land Co. *vs.* E. I. Messinger it is alleged that the land patented to the defendant was patented under the provisions of the act of Congress approved May 20th, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south of range sixteen east of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road, as designated on the map of August 17th, 1870, and that the said patent was dated the 17th day of August, 1894, while in the case of The Eastern Oregon Land Co. *vs.* John D. Wilcox it is alleged that the land patented to him was patented under the provisions of the act of Congress approved April 24th, 1820, entitled "An act making further provisions for the sale of public lands," and the acts supplemental thereto; that the lands patented were the northeast quarter and the southeast quarter of section fifteen, township five, south of range seventeen east of the Willamette meridian, in Oregon, and were situated more than twenty miles and less than forty miles from the line of the general route of the Northern Pacific Railroad Company's road, and that said patent was dated the 28th day of December, 1894.

It is stipulated by the parties to the above-entitled suits, by
3 their respective attorneys, that unless the above-entitled court shall otherwise order, only the record in the above-entitled suit of The Eastern Oregon Land Co. *vs.* John D. Wilcox shall be printed, and that the appeal in the case of The Eastern Oregon Land Co. *vs.* E. I. Messinger may be heard and submitted in said court without printing the record thereof.

DOLPH, NIXON & DOLPH,
Solicitors for Complainants and Appellants.
JNO. M. GEARIN AND
J. L. STORY,
Solicitors for Defendants and Respondents.

(Endorsed:) Filed Jan. 9, 1897. F. D. Monckton, clerk.

Citation.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To John D. Wilcox, Esq., Greeting:

Whereas the Eastern Oregon Land Company has lately appealed to the United States circuit court of appeals for the ninth circuit, from a decree rendered in the circuit court of the United States for the district of Oregon, in your favor, and has given the se-
4 curity required by law, you are, therefore, hereby cited and admonished to be and appear before said circuit court of appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this Jan. 5, 1897.

WM. B. GILBERT, *Judge.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

Due and legal service of the within citation is hereby admitted at Portland, in said district, this 5th day of January, A. D. 1897.

JNO. M. GEARIN,
Of Attorneys for Defendant.

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk, by G. H. Marsh, deputy clerk.

5 In the Circuit Court of the United States for the District of Oregon, April Term, 1896.

Be it remembered, that on the 8th day of July, 1896, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant, }
vs.
JOHN D. WILCOX, Defendant. }

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

The Eastern Oregon Land Company brings this, its bill of complaint, against the above-named defendant, and complaining says:

6 I.

That the complainant, The Eastern Oregon Land Company, is and was during all the times hereinafter mentioned, a corporation

duly incorporated under the laws of the State of California, and was and is a citizen of said State, and that the defendant above named is a citizen and resident of the State of Oregon.

II.

Your orator further shows to your honors that during all the times hereinafter mentioned The Dalles Military Road Company was and now is a corporation duly incorporated and organized under and by virtue of the general laws of the State of Oregon.

III.

Your orator further shows to your honors that on the 25th day of February, 1867, the Congress of the United States passed and the President of the United States duly approved an act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Canyon City, Mormon or Humbold basin, to a point on Snake river opposite Fort Boise in Idaho Territory, the alternate sections of
public lands designated by odd sections to the extent of three
7 miles in width on each side of said road; that said act provided that the lands granted should be exclusively applied to the construction of the road and to no other purpose and that they should be disposed of only as the work progressed and that lands lying within the limit fixed by said act and theretofore reserved or appropriated should be reserved from the operation of said act except so far as it was necessary to locate the road over the same, in which case the right of way to the width of 100 feet was granted; that said act further provided that the grant should not embrace mineral lands of the United States and that the lands thereby granted to the State of Oregon should be disposed of by the Legislative Assembly thereof for the purpose aforesaid and no other, and that the said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any of the property, troops, or mails of the United States; that said act also authorized the State of Oregon to locate and use in the construction of said road an additional amount of the public lands not previously reserved to the United States or otherwise disposed of and not exceeding ten miles in distance from the general route of the road and equal to the amount reserved within the limits of the grant in place from the operation of the act, said lieu lands to be selected in alternate sections as provided therein; that said act further provided that the lands thereby granted to the State of Oregon should be disposed of
only in the following manner, that is to say, when the gov-
8 ernor of the State should certify to the Secretary of the Interior that ten coterminous miles of said road were completed then a quantity of the land granted by the act not exceeding thirty sections might be sold and so on from time to time until said road should be completed and that if the road was not completed within five years no further sales should be made and the

lands remaining unsold should revert to the United States, and also the surveyor general of the district of Oregon should cause the lands granted by the act to be surveyed at the earliest practical period after the said State should have enacted the necessary legislation to carry the said act of Congress into effect.

IV.

And your orator further shows unto your honors that on the 20th day of October, 1868, the Legislative Assembly of the State of Oregon passed and the governor approved an act entitled "An act dedicating certain lands to Dalles Military Road Company," which act after setting forth the act of Congress aforesaid granted to the Dalles Military Road Co. all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon by the said act of Congress for the purposes of aiding said Dalles Military Road Company in constructing the road mentioned and described in said act of Congress aforesaid and upon the conditions and immunities therein described; and further that the said Legis-
9 lative Assembly granted and pledged to the said Dalles Military Road Co. all moneys, lands, rights, privileges, and immunities which might thereafter be granted to the State of Oregon to aid in the construction of said road for the purposes and upon the conditions mentioned in said act of Congress or which might be mentioned in any further grant of money or land to aid in the construction of such road, and the said act of the Legislative Assembly of the State of Oregon authorized the said Dalles Military Road Co. to locate, subject to the approval of the governor of the State of Oregon, all lands within the ten-mile limit prescribed by said act of Congress aforesaid in lieu of land reserved to or disposed of by the United States and lying and being within the limits of the grant as described in the first section of the act of Congress aforesaid.

V.

And your orator further shows unto your honors that the said Dalles Military Road Co. is a private corporation and was duly incorporated and organized on the 30th day of March, 1868, under and by virtue of the general laws of the State of Oregon providing for private corporations and the appropriation of private property therefor, and that the enterprise and business in which the said corporation proposed to engage was the location and construction of a clay road from the city of The Dalles, in the county of Wasco, Oregon, by way of Camp Watson and Canyon City to a point on Snake
10 river opposite Fort Boise in the Territory of Idaho about two miles below the mouth of Owyhee river; that James K. Kelly, N. H. Gates, and Orlando Humason, were the incorporators thereof; that on the 11th day of January, 1871, the Dalles Military Road Co., by Orlando Humason, Victor Trevett, O. S. Savage, O. W. Weaver, and B. W. Mitchell, the then directors thereof, in pursuance of the unanimous vote of the stockholders thereof, duly made and filed supplemental articles of incorporation, and that said supplemental

articles of incorporation contained but one article, which is as follows, to wit: "The enterprise and business in which the said corporation proposes to engage, in addition to the location and construction of a clay road as provided in the original articles of incorporation, is to accept and receive any and all grants of lands and other things of value from the United States and the State of Oregon and to sell and convey and to purchase and to hold land and other property which the said directors of said corporation may deem necessary and convenient for the interests thereof, and to engage in any business incidental to and connected with receiving any such grant and in selling, conveying, purchasing, and holding any land or property that may come into the possession of said company, also to establish and keep a toll-road on any part of the road belonging to said company.

VI.

11 And your orator further represents and shows unto your honors that prior to the 23rd day of June, 1869, the said Dalles Military Road Co. duly surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of Congress and in the said act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road and had filed in the executive office of the governor of the State of Oregon a plat or map of the said Dalles military road, upon which was traced and shown the definite location of said wagon road, from its terminus at the city The Dalles, Oregon, to its terminus on Snake river, and the limits of the grant of land in place made to the State of Oregon by the said act of Congress to aid in the construction of said road, and also the indemnity limits of said grant, and that on June 23rd, 1869, the governor of Oregon certified that the plat or map of said Dalles Military Road Co. had been duly filed in the executive office, that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city, on the Columbia river, to Fort Boise, on Snake river," and with the act of the Legislative Assembly of the State of Oregon approved October 20th, 1868, entitled "An act donating certain lands to the Dalles Military Road Co.," and the said governor
12 of Oregon at that date further certified that he had made a careful examination of said road since its completion and that the same was built in all respects as required by the said above-recited acts and was then accepted, as will more fully appear by said certificate, of which the following is a copy:

EXECUTIVE OFFICE, SALEM, OREGON, *June 23rd*, 1869.

I, George L. Woods, governor of the State of Oregon, do hereby certify that this plat or map of the Dalles military road has been duly filed in my office by the Dalles Military Road Co., and shows, in connection with the public surveys as far as the said public sur-

veys are completed, the location of the line of route as actually surveyed and upon which their road is constructed, in accordance with the requirements of the act of Congress approved February 25th, 1867, entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city, on the Columbia river, to Fort Boise, on Snake river," and with the act of the Legislative Assembly of the State of Oregon, approved October 20th, 1868, entitled "An act donating certain lands to Dalles Military Road Company;" and I further certify that I have made a careful examination of said road since its completion and that the same is built in all respects as required by the said above-recited acts, and that said road is accepted.

13 In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Oregon.

Done at Salem, Oregon, June 23rd, 1869.

GEORGE L. WOODS. [SEAL.]

Attest: SAMUEL E. MAY.

VII.

And your orator further shows unto your honors that upon the filing of the said plat or map in the executive office of the governor of the State of Oregon showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the governor of Oregon certifying to the completion of said road, the grant made by the said act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said road became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road as located and constructed.

VIII.

And your orator further shows unto your honors that the said Dalles Military Road Co. duly filed in the office of the Secretary of the Interior of the United States a map or plat of the said Dalles military road, showing the definite location thereof with reference to the public surveys so far as then made, and the said cer-

14 tificate of the said governor of the State of Oregon certifying to the construction of said road, and that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States and was accepted and received and filed in said department; and that on December 18th, 1869, the Commissioner of the General Land Office of the United States, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections within three miles from each side of said wagon road, as delineated and shown on said maps, in favor of the Dalles Military Road Company.

IX.

And your orator further shows unto your honors that the Congress of the United States, by an act approved June 19th, 1874, en-

titled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon to aid in the construction of certain wagon roads and the certificate of the governor of Oregon should show that any such road had been constructed and completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands, unless the State should by public act have transferred its interests in such lands to any corporation, in which case the said lands were to be patented to such corporation.

15 X.

And your orator further shows unto your honors that Edward Martin, then a resident of San Francisco, in the State of California, placing confidence in the truth of the certificate of the governor of the State of Oregon, dated June 23rd, 1869, that said road had been duly constructed in accordance with the requirements of said act of Congress approved February 25th, 1867, and also placing confidence in the order of the Commissioner of the General Land Office, dated December 18th, 1869, withdrawing said lands within the limits of the said grant in the State of Oregon in favor of the Dalles Military Road Company, from sale, and also believing that the said act of Congress, approved June 18th, 1874, would be carried into effect by the issuance of patents to the said Dalles Military Road Company for said lands, and without any notice or knowledge, actual or constructive, that any portion of said grant was claimed by the Northern Pacific Railroad Company or any other corporation or person, or that any portion of the lands within the limit of the grant in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a grant to the Northern Pacific Railroad Company or to any company or person or for any other reason, did on the 31st day of May, 1876, purchase in good faith, for a valuable consideration, to wit, the sum of $125,000.00, then paid by said Edward Martin

16 to said Dalles Military Road Company, all the lands embraced in the grant to said company, except such portions thereof as had been previously sold by it; that previous to the time of paying said sum of $125,000.00 purchase-money and receiving said deed, said Edward Martin had no notice or knowledge, actual or constructive, of any claim by the said Nothern Pacific Railroad Company or by any corporation or person or by the Government of the United States that any portion of the lands granted to the State of Oregon to aid in the construction of said wagon road were excepted or claimed to be excepted from said grant on account of any previous grant to the Northern Pacific Railroad Company or any corporation or person or for any reason whatever; that thereupon the said Edward Martin became and was a *bona fide* purchaser for a valuable consideration of all said lands then owned by the said Dalles Military Road Company, which were then conveyed to him by the said corporation, as will more fully appear by said deed, of which a copy is attached to this bill of complaint and marked Exhibit "A."

XI.

That said Edward Martin afterwards, to wit, on January 31st, 1877, executed and delivered to D. V. B. Henarie, a deed of trust, whereby he acknowledged that said D. V. B. Henarie was the owner of the undivided one-fourth of all the lands mentioned and described in the said deed of the Dalles Military Road Co. executed to the said Edward Martin and that he held the same in trust for
17 the said Henarie, which deed of trust was recorded in Wasco county, Oregon, on May 7th, 1884, in volume A, page 265, of Miscellaneous Records, also in Baker county, Oregon, on May 10th, 1884, in volume 2, page 317, of Record of Leases and Agreements, also in Grant county, Oregon, on May 27th, 1884, in volume A, page 584, of Miscellaneous Records.

XII.

And your orator further shows unto your honors that when said Edward Martin purchased said lands on May 21st, 1874, as hereinbefore stated, said D. V. B. Henarie paid one-fourth of the consideration of the same, to wit, one-fourth of $125,000.00; that he, the said D. V. B. Henarie made said purchase in good faith, relying upon the certificate of the governor of the State of Oregon that said road had been constructed according to the act of Congress approved February 25th, 1867, and also relying upon the act of Congress approved June 18th, 1874, that patents in due form of law would be issued to the Dalles Military Road Company for said lands; that he had no notice or knowledge, actual or constructive, at the time he paid one-fourth of the said purchase-money and when said deed was executed and delivered to said Edward Martin that any portion of the land so granted to the State of Oregon to aid in the construction of said road *were* claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to said Dalles Military Road Co., or that any portion of the grant of lands
18 in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road was excepted from said grant or claimed to be excepted from said grant by the United States, on account of the same being included in any grant to the Northern Pacific Railroad Company or any other company or person.

XIII.

And your orator further shows unto your honors that afterwards, to wit, on the 12th day of May, 1880, the said Edward Martin died intestate in the city of San Francisco, in the State of California, leaving a widow, Eleanor Martin, and leaving as his heirs, Thomas S. Martin, Edward Martin and Sarah A. F. Wilcox, who were then of lawful age, and James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, who were then minors; that in March, 1882, the interest of said minors in said lands *were* sold at a guardian sale by order of the county court of the State of Oregon for the county of Wasco, at which sale the interest of said

minors in said land was purchased in good faith, for a valuable consideration, by Peter Donahue and James Phelan, of San Francisco, California, as will more fully appear by Exhibit "B" attached hereto and made a part hereof; that at the time of the purchase of said lands by said Peter Donahue and James Phelan neither of them had any notice or knowledge, actual or constructive, that any portion of the lands within the limits of the grant made as
19 aforesaid by Congress to the State of Oregon to aid in the construction of said road or within the indemnity limits was claimed by the Northern Pacific Railroad Company or by any corporation or person adversely to the said Dalles Military Road Company, or was claimed by the United States or any corporation or person to be excepted from said grant or to have been excepted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company or to any corporation or person or for any other reason; that on the 11th day of August, 1884, all the heirs of the said Edward Martin and all persons who held an interest by purchase in said lands, to wit, P. J. Martin, Eleanor Martin, D. V. B. Henarie, Peter Donahue, Edward Martin, James V. Martin, Thomas S. Martin, Genevieve E. Walker and Joseph W. Winans, sold and by deed conveyed all their interest in the said lands to the Eastern Oregon Land Company, a corporation duly incorporated and organized under the laws of the State of California as will more fully appear by Exhibit "C" attached hereto and made a part hereof.

XIV.

And your orator further shows unto your honors that the said Dalles Military Road Co., duly selected, among other lands forming a portion of its said grant of lands in place, and which had been duly earned by the construction of its said wagon road, the
20 following-described land, to wit: the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian, and situated in the county of Sherman, and State of Oregon, the same lying within the limit of the grant of land in place to the said State of Oregon by the said act of February 25th, 1867, to aid in the construction of the said military wagon road, and being a portion of the lands withdrawn in favor of said Dalles Military Road Co., on the said 18th day of December, 1869, and being situated on the south side of the said line of the general route of the Northern Pacific railroad as delineated on said map filed by said company on the 13th day of August, 1870, and being situated more than twenty miles and less than forty miles from said line of general route of the Northern Pacific railroad, and being then unoccupied land and there being no claim thereto adverse to the said company, and that said selection was embraced in list No. —, and said list was duly certified by the register and receiver of the local land office at Dalles city to the Commissioner of the General Land Office at Washington city, District of Columbia.

XV.

And your orator further shows unto your honors that the Congress of the United States by an act entitled "An act to grant lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, etc., "ap-
21 proved July 2nd, 1864, created the corporation of the Northern Pacific Railroad Company, and authorized it to build a railroad from a point on Lake Superior, in Wisconsin or Minnesota, westerly by the most eligible route north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the Columbia river to a point at or near Portland, in the State of Oregon, and granted to said company every alternate section of land, not mineral, designated by odd numbers, to the amount of twenty odd sections to the mile on each side of said railroad line as said company might adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passed through any State and whenever on the line thereof the United States had full title not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road should be definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections should have been granted, sold, reserved or occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

XVI.

22 And your orator further shows unto your honors that by a joint resolution entitled "A resolution authorizing the Northern Pacific Railroad Co. to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31st, 1870, the Congress of the United Stater authorized the said Northern Pacific Railroad Co. to locate and construct under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main branch line across the Cascade mountains to Puget sound.

XVII.

And your orator further shows unto your honors that on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Co. filed a map or plat of the general route of its road and filed the same in the office of the Commissioner of the General Land Office and presented the same to the then Secretary of the Interior, showing among other things the general route of its said road following the Columbia river from Wallula in the then Territory of Washing-

ton to a point on the north side of said river opposite Portland in the State of Oregon, and the Secretary of the Interior did on the 13th day of August, 1870, accept said map and direct the honorable Commissioner of the General Land Office to withdraw on account of
23 the grant to the said Northern Pacific Railroad Company from sale, pre-emption, homestead or other disposal all odd-numbered sections not sold or reserved and to which prior rights had not attached within twenty miles on each side of the route of the said Northern Pacific Railroad Company lying south of the town of Steilacoom, in the State of Washington, and that on the 27th day of October, 1870, the honorable Secretary of the Interior Department wrote to the honorable Commissioner of the General Land Office as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Oct.* 27, 1870.

SIR: In my letters of the 13th and 16th inst. last, a withdrawal of lands for twenty miles on each side of the route of the Northern Pacific Railroad in Washington was ordered to be made. That withdrawal will be increased to forty miles on each side of the route, and you will issue instructions accordingly.

Very respectfully your obedient servant,

J. D. COX, *Secretary.*

To Hon. John S. Wilson, Commissioner of the General Land Office.

XVIII.

And your orator further shows unto your honors that the line of the road of the said Northern Pacific Railroad Company between Wallula and Portland or to a point opposite Portland was never surveyed, that the said line of said road between the said points was never definitely located or fixed by said company, that
24 no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington city or in the Interior Department, that the said Northern Pacific Railroad Company never constructed any portion of its said road between the said town of Wallula and the said city of Portland, and that the grant made or claimed to have been made by said last-mentioned act of Congress and the said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland; and that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never took effect and the said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by said act of Congress of February 25th, 1867, to the State of Oregon to aid in the construction of said wagon road.

XIX.

And your orator further shows unto your honors that upon the filing of the said map of general route of the line of its road by the

said Northern Pacific Railroad Company with the Commissioner of the General Land Office on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd-numbered sections lying within the supposed limits of the grant of lands
25 in place to the Northern Pacific Railroad Company as aforesaid, but did not determine or designate the number of sections to the mile or the limits of the supposed grant of lands in place to the Northern Pacific Railroad Company within the State of Oregon, but that the honorable Commissioner of the General Land Office erroneously and wrongfully transmitted to the local land offices in Oregon plats showing the general route of the road of the said Northern Pacific railroad as located and designated upon the said map filed by the Secretary of the Interior August 13th, 1870, and showing the limit of the grant in place to the Northern Pacific Railroad Company to be in Oregon between Wallula and Portland forty miles south of the line of said general route of its road, that the lands in place granted to the State of Oregon by the act of February 25th, 1867, to aid in the construction of said wagon road and which had been by the Commissioner of the General Land Office withdrawn in favor of the Dalles Military Road Co. on the 18th day of December, 1869, situated within forty miles of the line of the general route of said Northern Pacific railroad as designated on said maps were included within the limits of the lands in place designated upon the said maps transmitted to the register and receiver of the local land offices in Oregon as the limits of the lands in place granted to the said Northern Pacific Railroad Company, and that the register and receiver of the said local land offices in Oregon, and the honorable Commissioner of the General Land Office and the honorable Secretary of the Interior have since wrongfully claimed and the United States now wrongfully claims that the lands
26 situated within the limits of the grant in place to the State of Oregon by the said act of February 25, 1867, and lying within forty miles of the line of the general location of the road of said Northern Pacific Railroad Company, as designated aforesaid, were excepted from the grant to the State of Oregon under said act and had been previous to the date of the passage of said grant granted to the Northern Pacific Railroad Company and upon the alleged forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company became public lands of the United States.

XX.

And your orator further shows unto your honors that by an act of Congress to forfeit certain lands theretofore granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29th, 1890, the United States resumed title to and restored to the public domain so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroad not then completed and in operation for the construction or benefit of which such lands were granted.

XXI.

And your orator further shows unto your honors that after the passage of said act the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line
27 of the general route of the said road of the Northern Pacific Railroad Company between Wallula and a point on the north side of the Columbia river opposite the city of Portland, in the State of Oregon, as said line was traced and designated on the said map of general route filed by the said Northern Pacific Railroad Company in the office of the Commissioner of the General Land Office on the 13th day of August, 1870, as aforesaid, had been granted to said Northern Pacific and were reserved and excepted from the said grant made to the State of Oregon by the said act of February 25th, 1867, to aid in the construction of said wagon road, and that by said act of Congress forfeiting unearned railroad grants the said lands within the limits aforesaid had reverted to and become public lands of the United States open to settlement and sale under the land laws of the United States providing for the sale and disposal of the public land, although the said lands were also within the limits of the grant in place to said Dalles Military Road Company.

XXII.

And your orator further shows unto your honors that the said Secretary of the Interior thereupon caused the said lands to be opened to settlement and sale and thereupon the defendant settled upon the said tract of land hereinbefore described as: The northeast quarter and the southeast quarter of section fifteen in township five, south of range seventeen, east of the Willamette meridian,
28 and situated in the county of Sherman and State of Oregon, and made application to purchase the same under the act of Congress making further provision for the sale of public land, approved Apr. 24, 1820, and such proceedings were thereafter had upon said application that on the 28th day of Sept., 1894, the President of the United States issued a patent for the same to the said defendant, a copy of which is hereto attached, marked Exhibit "D;" that said Secretary of the Interior had no jurisdiction or authority to open the said lands within the limits of the grant of lands in place to the State of Oregon to aid in the construction of said Dalles Military Road Co. to settlement or to permit the defendant to settle upon or purchase the said lands and the President of the United States had no jurisdiction or authority to issue a patent therefor.

XXIII.

And your orator further shows unto your honors that at and before the time the defendant settled upon said tract of land and made claim thereto and made application to purchase the same, he, the said defendant, well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Co. and that

the same were claimed by the said Dalles Military Road Co. and by its successors and assigns under said grant.

XXIV.

And your orator further shows unto your honors that if it
29 had been true that the lands in Oregon within forty miles of the general route of the said Northern Pacific Railroad Company's road between Wallula and Portland, as designated on said map of the general route of its road filed by the said Northern Pacific Railroad Co. with the Secretary of the Interior on the 13th day of August, 1870, had been granted to the said Northern Pacific Railroad Co. by the said act of July 2nd, 1864, and the said joint resolution of May 31st, 1870, said grant had taken effect and that the said lands within the limits aforesaid were excepted from the grant to the said Dalles Military Road Co., this plaintiff being a *bona fide* purchaser of said lands would have had a preference right to apply for and purchase the lands so patented to the defendant by the United States, under the provisions of section five of an act of Congress, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3rd, 1867, but that your orator received no notice and had no notice or knowledge of the application of the said defendant to purchase said land and no opportunity to apply to purchase the same under the provisions of said section five or otherwise.

XXV.

And your orator further shows unto your honors that a patent having been issued to the defendant for the said lands, the Interior Department of the United States has no longer jurisdiction of the same and cannot give to your orator the most convenient
30 and conclusive evidence of his title to said land and cannot issue to your orator a patent for the same as required by the said act of June 18th, 1874, until the patent to the defendant has been canceled, annulled and set aside; and that said patent is a cloud upon the title of your orator to said lands described therein, and that your orator is remediless in a court of law.

Your orator therefore prays that the said patent issued to the defendant described in this bill of complaint be decreed fraudulent and void and be canceled and annulled; that your orator may be decreed to be the owner in fee-simple of the land described in said patent and entitled to the immediate possession thereof, and may have the process of this court to put it into possession thereof; or if it shall be determined by the court that the said defendant has acquired by said patent or otherwise any legal right or title to the property described therein, that he be declared the trustee of said right or title for your orator and be ordered and decreed to convey the said land to it, and that your orator may have such other and further relief as the facts will warrant or as to equity seems meet; that the writ of subpœna may issue requiring the defendant to

appear in this regard under certain pains and penalties
31 therein prescribed and answer to the foregoing bill of complaint, and that the defendant pay the costs, expenses and disbursements of this suit.

THE EASTERN OREGON LAND CO.,
[SEAL.] By T. P. BEACH, *Secretary.*
JAMES K. KELLY,
J. N. DOLPH,
RICHARD NIXON,
C. V. DOLPH,
Solicitors for Complainant.

CITY AND COUNTY OF SAN FRANCISCO, } ss:
State of California, }

I, T. P. Beach, being first duly sworn, say that I am the secretary of The Eastern Oregon Land Company, complainant above named, and that the statements contained in the foregoing bill of complaint are true, as I verily believe.

T. P. BEACH.

Subscribed and sworn to before me this 6th day of July, 1896.
[SEAL.] A. J. PORTER,
Notary Public in and for the City and County of San Francisco, State of California.

32 EXHIBIT "A."

Dalles Military Road Company to Edward Martin. } Deed. Filed for record on the 31st day of May, A. D. 1876.

This indenture, made and entered into this 31st day of May, A. D. 1876, between the Dalles Military Road Company, a corporation duly incorporated, organized and existing under the laws of the State of Oregon, having its principal office and place of business at Dalles city, Wasco county, State of Oregon, the party of the first part, and Edward Martin, of the city and county of San Francisco, State of California, the party of the second part:

Witnesseth: That the said party of the first part, the Dalles Military Road Company, a corporation as aforesaid, for the sum of one hundred and twenty-five thousand dollars to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, released and conveyed, and by these presents, it does grant, bargain, sell, release and convey unto the said party of the second part, his heirs and assigns, all the land lying and being in the State of Oregon granted or intended to be granted to said State by act of Congress approved February 25th, 1867, entitled, "An act granting lands to the State of Oregon
33 to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," and the right to a patent or patents for said lands granted to

said party of the first part by act of Congress approved June 18th, 1874, entitled, "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," which said lands were granted or intended to be granted by the State of Oregon to the said Dalles Military Road Company, by an act of the Legislative Assembly of said State of Oregon, approved October 20th, 1868, entitled, "An act donating certain lands to the Dalles Military Road Company," which said several acts are hereby made part hereof, and all the right, title and interest acquired or to be acquired by the party of the first part under the said several acts hereinbefore referred to, or either of them; and also all future right, title, interest, claim, property and demand, which the party of the first part may at any time hereafter acquire to said lands or any part thereof, or to any lands or to any patents or patent therefor by virtue of said acts of Congress, or either of them, and said act of the Legislative Assembly of the State of Oregon, whether said lands are surveyed or unsurveyed by virtue of any further compliance or any preceding compliance with the requirements of said acts or otherwise, subject to the payment by said party of the second part, of whatever may be due the United States for entering and patenting said lands.

It being the intention of the party of the first part to convey, and it does hereby convey to the party of the second part the said lands, and all the right, title and interest acquired by said party of
34 the first part, under said acts or either of them in said lands, or any part thereof, or any lands, being the interest in and to the lands and premises hereinbefore described, together with any and all future interest that it may hereafter acquire or now possess, by virtue of any further compliance with all or any of said several acts referred to; reserving and excepting from this conveyance, however, all sales of lands heretofore made by the party of the first part.

The said party of the first part hereby covenants and agrees with the party of the second part, that it will at any time when desired by said party of the second part, make to him, his heirs and assigns, any further conveyance and assurance of title to the lands aforesaid, and every part thereof, and said party of the first part covenants and agrees with said party of the second part to keep up its corporate organization and to do every act and thing necessary and requisite to perfect the title to all the lands included in the grant aforesaid.

To have and to hold the lands hereby granted and every part and parcel thereof unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has caused its corporate seal to be affixed to these presents, and the same to be signed by its president and secretary by resolution of the board of directors thereof duly passed to that effect at Dalles city, Wasco county, State of Oregon, this 31st day of May, 1876.

P. J. MARTIN,
Pres. D. M. R. Co..
C. N. THORNBURY,
Sec. D. M. R. Co.

35 And witness the seal thereof.

Signed, sealed and delivered in the presence of—
[SEAL.] BEN. KORTEN.
J. B. CONDON.

STATE OF OREGON, } ss:
County of Wasco, }

On the thirty-first day of May, A. D. 1876, before the undersigned, a notary public in and for Wasco county, State of Oregon, came the above-named P. J. Martin, president of the Dalles Military Road Company, and C. N. Thornbury, secretary of said company, both of whom are well known to me to be the persons described — and who executed the foregoing conveyance, and the said P. J. Martin acknowledged to me that he had executed the said conveyance as president of the said Dalles Military Road Company for the objects and purposes therein stated in compliance with a resolution passed by the board of directors of said company on the 31st day of May, A. D. 1876, and the said C. N. Thornbury acknowledged to me that he had executed the said conveyance for the purpose therein set forth, and in attestation thereto affixed to said conveyance the corporate seal of the Dalles Military Road Company as secretary thereof, in compliance with a resolution of the board of directors of said company.

36 In witness whereof, I have hereunto set my hand and affixed my notarial seal on the day and year first above written in this petition.

[SEAL.] JAMES B. CONDON,
Notary Public for Oregon.

EXHIBIT "B."

This indenture, made the twenty-first day of March, A. D. 1882, by and between Eleanor Martin, the duly appointed and qualified guardian of the persons and estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, party of the first part, and Peter Donahue and James Phelan, of the city of San Francisco, State of California, parties of the second part, witnesseth:

That, whereas, on the 3rd day of January, A. D. 1882, the county court of Wasco county, in the State of Oregon, made an order and license of sale authorizing the said party of the first part to sell certain real estate of the said minors, situate in the counties of Wasco, Grant and Baker, in the State of Oregon, and particularly described in the said order and license of sale, and which said order and license of sale now on file and of record in the said county court, Wasco county, are hereby referred to and made a part of this indenture; and

Whereas, under and by virtue of the said order and license of sale, and pursuant to legal notices given thereof, the said
37 party of the first part on the 6th day of February, A. D. 1882, at 2 o'clock — noon, at the court-house door, at The Dalles, in

the county of Wasco, State of Oregon, offered for sale at public auction, and subject to confirmation by the said county court of Wasco county, the portion of the said real estate situated in the said county of Wasco, and specified and described in said order and license of sale, as aforesaid; and at such sale the said parties of the second part became the purchasers of the whole of the said real estate hereinafter particularly described, situated in Wasco county aforesaid, for the sum of $57,500, they being the highest and best bidders, and that being the highest and best sum bid for the same; and

Whereas, the said county court of Wasco county, upon a due and legal return of her proceedings under the said order and license of sale made by the said party of the first part on the 24th day of February, 1882 did on the 6th day of March, A. D. 1882, make an order confirming the said sale and directing conveyances to be made, executed and delivered to the said parties of the second part, and which order of confirmation now on file and of record in the said county court of Wasco county is hereby referred to and made a part of this indenture:

Now, therefore, the said Eleanor Martin, the guardian of the persons and estate of the said minors, James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, as aforesaid, the party of the first part, pursuant to the order last aforesaid of the said county court of Wasco county, for and in consideration of the said sum of $57,500 to her in hand paid by
38 the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed unto the said parties of the second part, their heirs and assigns forever, all the right, title, interest and estate of the said James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin and Andrew D. Martin, minors, in and to all that part of the lands known as the Dalles military road lands, which are situate, lying and being in the county of Wasco, State of Oregon, the said Dalles military road lands, being the alternate sections of the public lands of the United States as surveyed or to be surveyed by the United States, designated by odd numbers, to the extent of three sections in width on each side of the military road constructed by the Dalles Military Road Company from Dalles City on the Columbia river to Fort Boise on the Snake river, and including such lieu lands as have been or may hereafter be selected and located, not exceeding ten miles in distance from said road under and in pursuance of the act of Congress entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," passed February 25, 1867, and any other acts of Congress and the acts of the Legislative Assembly of the State of Oregon relating or pertaining to the said Dalles military road lands, saving and excepting those portions of the Dalles military road lands which have been heretofore lawfully sold and conveyed by the said Dalles Military Road Company to other persons than Edward Martin and by said Edward Martin in his lifetime, the said lands so previously
39 conveyed not being included in this sale and conveyance, which said lands are listed in part only and amount to 247,230

acres, more or less. The interest of said minors in and to the above mentioned and designated lands so sold is five-eighths of three-fourths thereof, subject to the right of dower therein and thereto held by and belonging to Eleanor Martin, the widow of Edwa[illegible] Martin, deceased.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, their heirs and assigns, to their sole use, benefit, and behoof forever.

In witness whereof the said party of the first part, guardian as aforesaid, has hereto set her hand and seal the day and year first above written.

[SEAL.] ELEANOR MARTIN,
Guardian of the Persons and Estates of James V. Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, Minors.

Signed, sealed, and delivered in the presence of—
T. P. BEACH.
SAM'L S. MURFEY.

40 STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

On this 22nd day of March, A. D. 1882, personally came before me, Samuel S. Murfey, a commissioner of deeds for the State of Oregon, residing in the city and county of San Francisco, State of California, Eleanor Martin, guardian of the persons and estate of James Martin, Genevieve Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, minors, to me personally known to be the identical person described in and who executed the foregoing deed and who acknowledged to me that she executed the same as guardian aforesaid freely for the uses and purposes therein named.

In witness whereof I have hereunto set my hand and affixed my official seal this 22nd day of March, A. D. 1882.

[SEAL.] SAM'L S. MURFEY,
Commissioner of Deeds for the State of Oregon.

EXHIBIT "C."

Peter Donahue *et al.* to The Eastern Oregon Land Co. } Deed. Filed October 15th, 1884, at 10.30 a. m.

This indenture, made and entered into this eleventh day of August, A. D. one thousand eight hundred and eighty-four by and between Peter Donohue and Annie Donahue, his wife,
41 D. V. B. Henarie and Mary A. Henarie, his wife, Eleanor Martin, P. J. Martin and Margaret A. Martin, his wife, of the city and county of San Francisco, State of California, and James V.

Martin of the city and county of Los Angeles, State aforesaid, and Thos. S. Martin and Ada B. Martin, his wife, and Edward Martin of the city of Portland, State of Oregon, and Barton L. Walker and Genevieve E. Walker, his wife, of the city of Washington, District of Columbia, parties of the first part, and the Eastern Oregon Land Company, a corporation duly organized and incorporated under the laws of the State of California and having its office and principal place of business in the city and county of San Francisco, the party of the second part.

Witnesseth: Whereas, the said parties of the first part are the owners of and have each an undivided interest in common in the lands hereinafter mentioned and described in the respective proportions following, to wit: The said Peter Donahue three-sixteenths ($_{1}^{3}{}_{6}$), the said D. V. B. Henarie four-sixteenths ($_{1}^{4}{}_{6}$), the said Eleanor Martin four-sixteenths ($_{1}^{4}{}_{6}$), the said P. J. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said James V. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said Thomas S. Martin one-sixteenth ($_{1}^{1}{}_{6}$), the said Edward Martin one-sixteenth ($_{1}^{1}{}_{6}$), and the said Genevieve E. Walker one-sixteenth ($_{1}^{1}{}_{6}$); and whereas the said parties of the first part have negotiated with the said party of the second part for the sale of the said lands upon terms which have been mutually agreed upon by and between the several and respective parties hereto of the first and second parts; Now, therefore, in consideration of the premises and of the sum of one dollar lawful money of the United States of America to each of
42 them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm into the said party of the second part, its successors and assigns, all those certain lands situate, lying and being in the counties of Wasco, Grant and Baker, State of Oregon, granted to the State of Oregon by the act of Congress of the United States of America entitled: "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river, approved February 25th, A. D. 1867, and granted to the said Dalles Military Road Company by an act of the Legislative Assembly of the said State of Oregon, entitled, "An act donating lands to the Dalles Military Road Company," approved October 20th, 1868, being the lands conveyed to Edward Martin, now deceased, by the said The Dalles Military Road Company by its deed bearing date May 31st, 1876, and duly recorded in the office of the county clerk of the said county of Wasco on the 31st day of May, A. D. 1876, in vol. "E," page 435, and in the office of the county clerk of the said county of Grant on the 3d day of June, A. D. 1876, in Book "C," page 195, and in the office of the county clerk of the said county of Baker on the 7th day of June, A. D. 1876, in Book "D" of Deeds, page 200, and commonly known and designated as the Dalles military road lands, a portion of which lands are embraced in the county of Crook recently formed or about to be formed of and from a portion or portions of
43 said Wasco and Grant counties, saving and excepting therefrom and from the operation of this conveyance certain por-

tions and parcels of said Dalles military road lands heretofore sold and conveyed by the said Edward Martin, grantee thereof as aforesaid, in his lifetime and by his successors in interest.

The several and respective interests of the said several and respective parties of the first part by them respectively herein and hereby conveyed being subject to the proper and respective proportions of the debts, charges and expenses belonging thereto respectively, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

P. DONAHUE. [SEAL.]

Signed, sealed and delivered in presence of A. Maude Henarie, Eugene W. Levy.

ANNIE DONAHUE. [SEAL.]

As to signature of Mary A. Henarie, Annie Martin, Eugene W. Levy.

D. V. B. HENARIE. [SEAL.]

44 As to signature of Margaret A. Martin, Eugene W. Levy and Chas. T. Stanley.

MARY A. HENARIE. [SEAL.]

As to signatures of P. Donahue and Annie Donahue, Eugene W. Levy and T. P. Beach.

ELEANOR MARTIN. [SEAL].

As to signature of D. V. B. Henarie, Eugene W. Levy and T. P. Beach.

P. J. MARTIN. [SEAL.]

Witnesses as to signature of Eleanor Martin, Eugene W. Levy and T. P. Beach.

MARGARET A. MARTIN. [SEAL.]

As to signature- of P. J. Martin and James V. Martin, Eugene W. Levy and Chas. T. Stanley. (Seal.)

JAMES V. MARTIN. [SEAL.]

As to signature of Edward Martin, Eugene D. White and Arthur E. Sloan.

THOS. S. MARTIN. [SEAL.]

Witness- to signature of Thos. S. Martin, Eugene D. White and Arthur E. Sloan. (Seal.)

ADA B. MARTIN. [SEAL.]

Witness to signature of Ada B. Martin.

EDWARD MARTIN. [SEAL.]

Witnessess to signatures of B-rton L. Walker and Genevieve Walker, John E. Beal and Albert D. Gilner.

BARTON L. WALKER. [SEAL.]
GENEVIEVE WALKER. [SEAL.]

45 STATE OF OREGON, } ss:
County of Multnomah, }

Be it remembered that on this eighteenth day of August, 1884, before me the undersigned, a notary public in and for said county and State, personally appeared the within-named Thos. S. Martin and Ada B. Martin, who are known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same, and Ada B. Martin, wife of the said Thos. S. Martin, on an examination made by me separate and apart from her said husband acknowledged to me that she executed the same freely and voluntarily and without fear, coercion or compulsion from any one.

In testimony whereof, I have hereunto set my hand and notarial seal the day and year last above written.

[SEAL.] EUGENE D. WHITE,
Notary Public for Oregon.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State
46 of California, personally appeared James V. Martin and Edward Martin, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the 11th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared Peter Donahue and Annie Donahue, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein men-
47 tioned; and the said Annie Donahue on examination and separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared D. V. B. Henarie and Mary A. Henarie, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned, and the said Mary A. Henarie on examination separate and apart from her said
48 husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this eleventh day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of deeds for the State of Oregon, duly appointed, commissioned and sworn, and residing in the city and county of San Francisco, State of California, personally appeared P. J. Martin and Margaret A. Martin, his wife, to me personally known to be the identical persons whose names are subscribed to, who are described in and who executed the annexed and within instrument, and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Margaret A. Martin on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

49 In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On the 25th day of August, A. D. one thousand eight hundred and eighty-four, before me, Eugene W. Levy, a commissioner of

deeds for the State of Oregon duly appointed, commissioned and sworn and residing in the city and county of San Francisco, State of California, personally appeared Eleanor Martin (widow), to me personally known to be the identical person whose name is subscribed to, who is described in and who executed the annexed and within instrument; and she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] EUGENE W. LEVY,
Commissioner of Deeds for the State of Oregon in California.

50 DISTRICT OF COLUMBIA, }
City and County of Washington, } *ss:*

On the 12th day of September, one thousand eight hundred —, city of Washington, D. C., personally appeared Barton L. Walker and Genevieve E. Walker, his wife, to me personally known to be the identical persons whose names are subscribed to and who are described in and who executed the annexed and within instrument; and they severally duly acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned; and the said Genevieve E. Walker on examination separate and apart from her said husband duly acknowledged to me that she executed the same freely and without fear or compulsion from any one.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] JOHN E. BEALL,
A Commissioner of Deeds for the State of Oregon in and for the District of Columbia.

EXHIBIT "D."

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

(*Certificate No.* 3904.)

Whereas John D. Wilcox of Sherman county, Oregon,
51 has deposited in the General Land Office of the United States a certificate of the register of the land office at The Dalles, Oregon, whereby it appears that full payment has been made by the said John D. Wilcox according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," and the acts supplemental thereto, for the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian in Oregon, containing three hundred and

twenty acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John D. Wilcox:

Now know ye, that the United States of America in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said John D. Wilcox and to his heirs, the said tract above described.

To have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said John D. Wilcox and to his heirs and assigns forever, subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water
52 rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law; and there is reserved from the lands hereby granted a right of way thereof for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and ninety-four and of the Independence of the United States the one hundred and nineteenth.

By the President:

[SEAL.] GROVER CLEVELAND,
By E. MACFARLAND,
Ass't Secretary.

Recorded vol. 8*a*, page 222.

L. Q. C. LAMAR,
Recorder of the General Land Office.

Filed for record Feb. 28th, A. D. 1895, at 8.20 o'clock a. m.

(Endorsed:) Filed July 8, 1896. J. A. Sladen, clerk.

53 And afterwards, to wit, on the 8th day of July, 1896, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant. } No. 2325.

Subpœna ad Respondendum.

The President of the United States of America to John D. Wilcox, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of August next, which will be the third day of August, A. D. 1896, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The Eastern Oregon Land Company is complainant, and you are defendant, and further
54 to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and ninety-six and of the Independence of the United States the one hundred and —.

[SEAL.] J. A. SLADEN, *Clerk*,
By G. H. MARSH,
Deputy Clerk.

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.—The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

(Endorsed:) Returned and filed July 14, 1896. J. A. Sladen, clerk.

55 *Return of Civil Process.*

UNITED STATES OF AMERICA, } *ss.*:
District of Oregon, }

I hereby certify that on the 13th day of July, 1896, at 4 miles S. W. from Kent, Sherman county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named John D. Wilcox, by delivering to him personally a true copy of said *subpœna ad respondendum*, duly certified to by me as U. S. marshal,

together with a copy of the complaint in the within-entitled cause, duly certified to by Richard Nixon, of attorneys for the plaintiff.

H. C. GRADY,
United States Marshal,
By GEO. HUMPHREY, *Deputy.*

And afterwards, to wit, on the 3d day of August, 1896, there was duly filed in said court a præcipe for appearance of defendant, in words and figures as follows, to wit:

56 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
vs.
JOHN D. WILCOX.

Præcipe.

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor in the above-entitled cause for the defendant, John D. Wilcox.

GEARIN, SILVESTONE & BRODIE, *Solicitors.*

(Endorsed:) Filed August 3, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on the 4th day of September, 1896, there was duly filed in said court an answer, in words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Answer.

Defendant in the above-entitled suit saving and reserving to himself all benefit or advantage of exception or otherwise to which he may be or become entitled by reason of the many errors, uncertainties, and insufficiencies of the bill of complaint of the complainant herein, for answer thereto or to so much and such parts or portions thereof as it may be material or necessary for him to answer unto, answering says:

1st.

This defendant admits all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of complainant's bill.

58 2nd.

This defendant admits all the allegations contained in paragraph 10 of complainant's bill except that this defendant denies that on

the 31st day of May, 1876, or at the time of the purchase of the lands mentioned in said paragraph 10 or of issuing the deed therefor or at any time Edward Martin had no constructive notice or knowledge that any portion of the lands within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted therefrom on account of a previous grant to the Northern Pacific Railroad Company, but this defendant alleges in relation thereto that said Edward Martin at the time he made said purchase and received said deed was chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said acts of Congress and the acts and doings of the said railroad company no title could pass to said Dalles Military Road Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17, east of the Willamette meridian, for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the act of Congress approved July 2, 1864, entitled, "An act to grant lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast, etc."

59

3rd.

The defendant admits all the allegations in paragraph 11 of complainant's bill.

4th.

This defendant admits all the allegations in paragraph 12 of complainant's bill except that this defendant denies that at the time said D. V. B. Henarie made said purchase, or when he paid said money or received the deed as described in said paragraph 12, or at any time, he had no constructive notice that the land so granted to the State of Oregon to aid in the construction of said road was claimed by the Northern Pacific Railroad Company, and denies that said D. V. B. Henaries had not at said or any time constructive notice that said lands in place or within the indemnity limits to the said State of Oregon to aid in the construction of said road were excepted from said grant and claimed to be excepted from said grant by the United States on account of the same being included in the grant to the Northern Pacific Railroad Company by said act of Congress approved July 2nd, 1864. And this defendant alleges in relation thereto that at the time said D. V. B. Henarie made such purchase and at the time he paid one-fourth of said purchase-money, and at all times was chargeable with constructive notice of the several acts of Congress in relation to said lands, and the effect thereof, and that under said acts of Congress, and the acts and

60

doings of said railroad company, no title could pass to said Dalles Military Road Company for the northeast quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette meridian for the reason that the same was included in the grant to the Northern Pacific Railroad Company by the act of Congress above referred to and approved July 2nd, 1864, making the grant of lands to the Northern Pacific Railroad Company.

5th.

This defendant admits all the allegations contained in paragraph 13 of complainant's bill, except this defendant denies that at the time of the purchase of said lands by Peter Donahoe and James Phelan, as set out in said paragraph, said Peter Donahoe and James Phelan did not have constructive notice that said lands so purhased were within the limits of the grant made by Congress to the Northern Pacific Railroad Company, and that the same were claimed by said Northern Pacific Railroad Company, and were claimed by the United States to be exempted from said grant on account of their having been previously granted to the Northern Pacific Railroad Company. And this defendant alleges in relation thereto that the said Peter Donahoe and James Phelan were chargeable with constructive notice of the several acts of Congress in relation to said lands and the effect thereof, and that under said acts of Congress,
and the acts and doings of said railroad company, no title
61 could pass to said Dalles Military Road Company for the
northeast quarter of the southeast quarter of section 15, township 5 south of range 17 east of the Willamette meridian: reason that the same was included in the grant to the Northern Pacific Railroad Company above referred to, approved July 2, 1864, making the grant of lands to the Northern Pacific Railroad Company.

6th.

This defendant admits all the allegations in paragraphs 14, 15, 16, and 17 of complainant's bill, and in relation to the facts set out in said paragraph 17 of complainant's bill, this defendant further says that on March 6, 1865, the then Secretary of the Interior received from Josiah Perham, the then president of the Northern Pacific Railroad Company, a certain letter of that date, a copy of which letter is filed herewith and made a part hereof, marked "Exhibit A." That accompanying said letter was the map referred to therein, a copy of which is herewith filed and made a part hereof, marked Exhibit "B." That on March 9th, 1865, the then Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with letter, a copy of which is filed herewith and made a part hereof marked Exhibit "C." That on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior with a letter, a copy of which, with its endorsement, is filed herewith and made a part hereof marked Exhibit "D."

62 7th.

This defendant answering paragraph 18 of complainant's bill denies that the grant of lands made by said act of Congress of July 2nd, 1864, and said joint resolution of May 31st, 1870, never was located or fixed for that portion of the road of said Northern Pacific Railroad Company between Wallula and the city of Portland: denies that the said grant to the Northern Pacific Railroad Company to aid in the construction of said road between said points never

took effect. Denies that said Northern Pacific Railroad Company never acquired any right or title to or interest in any of the lands embraced within the limits of the grant made by the act of Congress of February 27th, 1867, to the State of Oregon to aid in the construction of said wagon road.

8th.

Answering paragraph 19 of the complainant's bill this defendant denies that the Commissioner of the General Land Office erroneously or wrongfully transmitted to the local land offices in Oregon the plats described in said paragraph 19 and alleges in relation thereto that said maps were rightfully transmitted to said land offices and said plats are correct. This defendant admits that the Commissioner of the General Land Office and the Secretary
63 of the Interior and the United States claim that said lands were exempted from said grant of the lands to the State of Oregon, and that they had been previous to the passage of said act granted to the Northern Pacific Railroad Company, and upon the forfeiture of the unearned portion of the grant to the Northern Pacific Railroad Company, they became public lands of the United States. And the defendant denies said claim is wrongful, and alleges that the same is rightful and that such are the facts.

9th.

This defendant admits the allegations in paragraph 20 of complainant's bill.

10th.

This defendant admits the allegations in paragraph 21 of complainant's bill, except defendant denies that the act of the Secretary of the Interior as set out in said paragraph was wrongful and alleges that the same was rightful.

11th.

This defendant admits the allegations contained in paragraph 22 of complainant's bill, except that defendant denies that the Secretary of the Interior had no jurisdiction to open said lands for settlement or to permit the defendant to settle thereon or to purchase the same, and denies that the president had no jurisdiction or authority to issue a patent therefor.

64–66 Wherefore this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. L. STORY AND
GEARIN, SILVESTONE & BRODIE,
Solicitors for Defendant.

FOLDOU

EXHIBIT "A" TO ANSWER.

WASHINGTON, D. C., *March* 6, 1865.

Hon. J. P. Usher, Secretary of the Interior.

SIR: Under authority of the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your direction the land granted to said company may be marked and withdrawn from sale in conformity to law.

I am respectfully, your obedient servant,

JOSIAH PERHAM,
Pres. N. P. R. R. Company.

67 EXHIBIT "C" TO ANSWER.

WASHINGTON, D. C., *March* 9, 1865.

SIR: Herewith I transmit a map upon which the general line of the Northern Pacific Railroad Company, as adopted by the board of directors of that railroad company is delineated; also a copy of the letter of the president of said company dated the 6th instant, requesting that the granted lands along said line be withdrawn from the market in view of the provisions of the 3rd and 6th sections of the act of Congress approved July 2nd, 1864 (Pamphlet Laws, pages 368, 369). Should you perceive no objection I think that the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin; and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget sound may be withdrawn as requested as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of the act of Congress.

Very respectfully your obedient servant,

J. P. USHER, *Secretary.*

Commissioner of the General Land Office.

(Here follows diagram marked p. 67*a*.)

68 EXHIBIT "D" TO ANSWER.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June* 22, 1865.

SIR: The late Secretary of the Interior, under date of the 9th of March last, enclosed to this office a diagram showing the proposed route of the Northern Pacific railroad, for which a grant of lands was made by the act approved July 2, 1864 (Stats. at Large, Pamphlet Laws 1864, page 365).

This diagram was filed in the Secretary's office, accompanied by a request for withdrawal of lands.

As no withdrawal was ordered by the late Secretary, no action was here taken upon the application.

Mr. Perham, the president of the railroad company, has called attention to the matter, and in submitting it I have the honor to state: 1. That the present application deals with the railroad system of granting on the largest scale known to congressional legislation. It extends from Lake Superior to the Pacific ocean, and allowing for probable deflections may be set down at 2,025 miles in length, taking in alternate sections by estimate 47,360,000 acres in a belt of 40 miles wide through the Territories, and 20 miles wide through the States, the general or conjectural course being indicated on the map herewith.

By the opinions of Attorney General Cushing, of December 19th, 1856, and February 16th, 1857 (Opinions of Attorney Gen-
69 eral, vol. VIII, pages 244 and 290), and the action of the department, railroad grants take effect from the date when the survey of the route is actually made on the face of the earth.

The evidence required of the route under the established ruling of the department is a connected map showing the exact location, the map indicating by flag-staffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section or smallest legal subdivisions cut by the route.

In the judgment of the Commissioner no withdrawal should be ordered until such map is filed in the General Land Office; and although in the Attorney General's opinion—Mr. Cushing—the right takes hold from the date of actual survey on the ground, yet upon that point this office, with deference to superior legal authority, holds that the grant does not become effective until the map is actually filed in the district land office, where citizens resort to ascertain what is public land and what is not, so that purchases can be made without danger of conflicting title. Yet, even admitting that the right in the railroad grant attaches from the date of such surveys, we are without the means of ascertaining and determining the interests of rightful claimants until such map is filed.

Now in this view the Commissioner reports that no with-
70 drawal should be ordered until the map of actual survey, authenicated as indicated, shall be filed in the district and General Land Offices.

This may be done, starting from the cul-de-sac of Lake Superior, the eastern initial point of the route, and stretching thence westwardly to the western boundary of Minnesota, the line of the public survey having been that far established.

2. The same course of proceeding to be had in regard to that portion of the road falling on the western or Pacific side within the range of existing public surveys, but,

3. Of course no withdrawal can now be made on account of the road in the region of country extending across that part of the country between the west boundary of Minnesota to the eastern surveys of Washington Territory, because over that Territory the lines of the public surveys have not yet been established. In this extended locality the withdrawal should only be ordered as the public surveys are advanced, and survey of railroad established in like manner as indicated under first head.

4. A general withdrawal upon conjectural or uncertain basis might result from shutting out from settlement large bodies of land which an actual survey would show not within the grant, whilst lands would be omitted from the withdrawal which the survey might require to be included.

Then it is not sound policy, nor is there any warrant in
71 our land legislation for doing any act, the tendency of which would give preference to satisfying a grant on such a stupendous scale as this whilst individual claims under our general system of land laws, homestead pre-emption and sale would be unaided by any such preliminary discriminating proceeding.

The result of a premature withdrawal on uncertain basis would be unjust to the pioneer settler, detrimental to the public interests in arresting the progress of settlement and disposal in that direction of the public domain, and to that extent checking the growth and prosperity of our frontier, and that too, in the vicinity of a colonial dependence of a powerful nation, would be a prejudice to the interests of the railroad grant itself in excluding settlers and immigrants whose labor and means would enhance the value of such lands as in the ordinary progressive operations of the land system would in due time fall to the grant. The land system should be so administered that all different acts of land legislation may be at the same time in full operation, giving precedence to no law over another unless where the terms of law indicate the public will to be otherwise, leaving corporate or other grantees and individuals respectively to have the benefit of their superior diligence in establishing and completing their several claims according to law.

For these considerations this office declines ordering a withdrawal until authenticated maps of the actual survey of the several portions of the route shall be successively filed from time to time to completion, showing the connections of said portions with the lines
72 of the public surveys, yet respectfully submits the foregoing

considerations for such directions as the Secretary may be pleased to give in the premises for the government of this office.

With great respect, your obedient servant,

JOS. J. WILSON,
Acting Commissioner.

Hon. Jas. Harlan, Secretary of the Interior.

STATE OF OREGON, }
County of ——, } *ss:*

I, John D. Wilcox, being first duly sworn, say on oath that I am the defendant in the above-entitled suit and that the matters therein stated are true of my own knowledge except as to those matters stated on information and belief, and as to such matters I believe the same to be true.

J. D. WILCOX.

Subscribed and sworn to before me this 29th day of August, 1896.
[SEAL.] J. L. STORY,
Notary Public for Oregon.

DISTRICT OF OREGON, *ss:*

Due service of the within answer is hereby accepted in the district of Oregon, at Portland, this 4th day of September, 1896, by receiving a copy thereof, duly certified to as such by Geo. A. Brodie, one of the solicitors for defendant, except as to Exhibit "B," a copy of which is waived.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

(Endorsed:) Filed September 4, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on Monday, the 7th day of September, 1896, the same being the 127th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant. } No. 2325.

Order.

Now at this day comes the complainant, by J. N. Dolph, of counsel, the defendant appearing by John M. Gearin, of counsel, and on motion of complainant, the defendant by his said counsel consenting thereto,

It is ordered that the above-entitled suit be, and the same is, set

down for hearing upon bill and answer and that it be heard on September 11th, 1896, at eleven o'clock a. m.

Dated September 7, 1896.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed September 7, 1896. J. A. Sladen, clerk.

And afterwards, to wit, on Friday, the 11th day of September, 1896, the same being the 131st judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger United States district judge presiding—the following proceedings were had in said case, to wit:

75 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
vs.
JOHN D. WILCOX. } No. 2325.

Order.

SEPTEMBER 11, 1896.

Now, at this day, comes the plaintiff herein, by Mr. J. N. Dolph, of counsel, and moves the court for a continuance of this cause, heretofore set for Friday, September 11, 1896, whereupon it is ordered that the final hearing of this cause be, and it is hereby, continued to Tuesday, September 15, 1896.

And afterwards, to wit, on Tuesday, the 15th day of September, 1896, the same being the 134th judicial day of the regular April term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said case, to wit:

76 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY
vs.
JOHN D. WILCOX. } No. 2325.

Order.

SEPTEMBER 15, 1896.

Now, at this day, comes the plaintiff, by Mr. J. N. Dolph, of counsel, and the defendant, by Mr. John M. Gearin, of counsel, and thereupon this cause comes on to be heard upon the bill and answer herein, and the court having heard the arguments of counsel will advise thereof.

And afterwards, to wit, on Tuesday, the 5th day of January, 1897, the same being the 79th judicial day of the regular October term of said court—present, the Honorable William B. Gilbert, United States circuit judge presiding—the following proceedings were had in said case, to wit:

77 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Decree Dismissing Bill of Complaint.

This cause having been heard and submitted to the court on the 15th day of September, 1896, upon bill and answer, and the court having taken the same under advisement, and now due deliberation having been had, it is ordered, adjudged, and decreed that the said bill of complaint herein be, and the same is hereby, dismissed, with costs to the complainant to be taxed.

Dated January 5th, 1897.

WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

78 And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court, petition for appeal and an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Petition for Appeal.

The above-named complainant, The Eastern Oregon Land Company, conceiving itself aggrieved by the decree made and entered on the 5th day of January, 1897, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the
79 record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated Jan. 5th, 1897.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.

The foregoing claim of appeal is allowed.

Dated January 5th, 1897.

WM. B. GILBERT,
Circuit Judge.

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing petition on appeal on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
Solicitor for Defendant and Appellee.

80 In the Circuit Court of the United States for the District of Oregon. In Equity.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Assignment of Errors.

And now on the 5th day of January, 1897, came the complainant, by Dolph, Nixon & Dolph, its solicitors, and says that the decree in the above-entitled cause is erroneous and against the just rights of the complainant, for the following reasons:

First. Because it appears by the bill and answer in said suit that a decree should have been rendered and given therein by said court in favor of the complainant as prayed for in the bill of complaint, to wit:

That the patent for the lands in controversy issued by the United States to the defendant described in the bill of complaint was fraudulent and void as against the complainant, and that the same
81 be canceled and annulled; that complainant was the owner in fee-simple of the lands described in said patent and was entitled to the immediate possession thereof and to have the process of the court to be put in possession thereof, and that the defendant was trustee for the complainant of whatever title was conveyed to him under said patent and that he convey the same to the complainant.

Second. Because it appeared by the bill and answer that the defendant was not entitled to a decree and the court erred in rendering a decree for the defendant dismissing the complainant's bill.

Third. Because it appeared by the bill and answer in said suit that the land in controversy was granted to the State of Oregon by an *an* act of Congress entitled "An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles city on the Columbia river to Fort Boise on the Snake river," approved February 25, 1867, and had been granted by the State of Oregon to the Dalles Military Wagon Road Company by act of the Legislative Assembly of the State of Oregon, approved October 20, 1868, and that all the conditions of said grant had been complied with by said company, the definite location and construction and completion of said road had been duly certified to by the governor of Oregon on the 23rd day of June, 1869, and on said date the said land had been withdrawn from settlement and sale, and the title of the said wagon road company had become absolute before the passage

of the joint resolution of May 31st, 1870, authorizing the
82 Northern Pacific Railroad Company to locate the main line
of its road via the valley of the Columbia river and that complainant had succeeded to the title of said company.

Fourth. Because the court erred in holding and deciding that the grant of lands made to the State of Oregon by the said act of Congress of February 25, 1867, did not come within the exceptions to the grant of land made to the Northern Pacific Railroad Company by the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," approved July 2, 1864, and the joint resolution of Congress entitled "A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage and for other purposes," approved May 31, 1870.

Fifth. Because the court erred in holding and deciding that the land in controversy *and* granted to the Northern Pacific Railroad Company by said act of July 2, 1864, or the said joint resolution of May 31, 1870.

Sixth. Because the court erred in holding and deciding that it appeared from the bill and answer that the land in controversy was or ever had been a portion of the said grant to the Northern Pacific Railroad Company.

Seventh. Because the court erred in holding and deciding that the grant of lands to the said Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, were ever
83 located or fixed so as to attach to any particular parcel of
land or to show that the lands in controversy were a part of said grant.

Eighth. Because the court erred in holding and deciding that the lands in controversy were excepted from the grant to the State of Oregon made to it by the said act of Congress approved February 25, 1867.

Ninth. Because the court erred in holding and deciding that the supposed grant to the Northern Pacific Railroad Company for its road from Wallula to Portland was ever located or fixed or that said company ever acquired any right or title to the lands in controversy so as to segregate them from the public domain or to prevent the said grant to the State of Oregon from attaching thereto.

Tenth. Because the court erred in holding that the map referred to in the answer and known as the Perham map was valid or in any manner located the line of the road of the Northern Pacific Railroad Company or located or defined its supposed land grant or reserved or withdrew any lands from the operation of the said grant to the State of Oregon.

Eleventh. Because the court erred in holding that on account of said grant to the Northern Pacific Railroad Company made by said act of July 2, 1864, or the said joint resolution of Congress of May 31, 1870, or the transmission by said company of the said Perham map to the Secretary of the Interior or the filing of said map of

August 13th, 1870, of its general route of its road by said
84 Northern Pacific Railroad Company from Wallula to Portland or any other matter or proceeding the land in controversy was excepted from the operation of said grant to the State of Oregon.

Twelfth. Because the court erred in holding and deciding that the land in controversy was forfeited to the United States by the act of Congress forfeiting grants and had been restored to the public domain and was open to settlement or subject to sale by the United States at the time of the defendant's alleged purchase of the same.

Thirteenth. Because the court erred in not holding that said defendant had obtained and held the legal title to the land in controversy as trustee for the complainant.

Wherefore the said complainant prays that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayer of the bill.

DOLPH, NIXON & DOLPH.
Solicitors for Complainant.

I hereby this 5th day of January, 1897, accept due and personal service of the foregoing assignment of error on behalf of John D. Wilcox, defendant.

JNO. M. GEARIN,
Solicitor for Appellee.

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court, bond for costs on appeal, in words and figures as follows, to wit:

85 In the Circuit Court of the United States for the District of Oregon.

THE EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Bond for Costs on Appeal.

Know all men by these presents that we, The Eastern Oregon Land Company, are held and firmly bound unto John D. Wilcox, the above-named defendant, in the sum of two hundred and fifty dollars, to be paid to the said John D. Wilcox, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 5th day of Jan., 1897.

Whereas the above-named Eastern Oregon Land Company has

appealed to the United States circuit court of appeals for the
86 ninth circuit, to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon.

Now, therefore, the condition of this obligation is such that if the above-named, The Eastern Oregon Land Company shall prosecute said appeal to effect, and answer all costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE EASTERN OREGON LAND COMPANY,
(S'g'd) By DOLPH, NIXON & DOLPH,
Its Attorneys. [L. S.]
(S'g'd) CHARLES STERN. [L. S.]
(S'g'd) JOHN O'CONNOR. [L. S.]

Signed, sealed, and delivered in the presence of—
—— ——.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Charles Stern, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) CHARLES STERN.

Subscribed and sworn to before me this 5th day of January, 1897.

[SEAL.] RICHARD NIXON,
Notary Public for Oregon.

87 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, John O'Connor, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and householder within said district, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

(S'g'd) JOHN O'CONNOR.

Subscribed and sworn to before me this 5th day of January, 1897.

[SEAL.] RICHARD NIXON,
Notary Public for Oregon.

The foregoing bond is approved Jan. 5, 1897.

(S'g'd) WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

And afterwards, to wit, on the 5th day of January, 1897, there was duly filed in said court a stipulation and order to send original Exhibit "B" to answer with transcript, in words and figures as follows, to wit:

88 In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY, Complainant,
vs.
JOHN D. WILCOX, Defendant.

Stipulation and Order.

It is hereby stipulated between the parties to the above-entitled suit, by their respective attorneys, that the map commonly known as the Perham map, attached to the answer of the defendant herein, may be withdrawn from the files and made part of the record to be sent to the United States circuit court of appeals for the ninth circuit, the court consenting thereto.

DOLPH, NIXON & DOLPH,
Solicitors for Complainant.
JNO. M. GEARIN,
Solicitor for Defendant.

89 Based upon the foregoing stipulation, it is ordered that the original map referred to be withdrawn from the files of the court and made a part of the record on appeal in the above-entitled suit.

WM. B. GILBERT, *Judge.*

(Endorsed:) Filed January 5, 1897. J. A. Sladen, clerk.

Clerk's Certificate to Transcript.

DISTRICT OF OREGON, *ss:*

I, J. A. Sladen, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing transcript of record on appeal to the United States circuit court of appeals for the ninth circuit, in cause No. 2325, The Eastern Oregon Land Company *vs.* John D. Wilcox, is a full, true, and correct transcript of the record in said cause as the same appears at my office and in my custody.

I further certify that the cost of the foregoing transcript is thirty-four and $\frac{20}{100}$ dollars, and that the same has been paid by the appellant, The Eastern Oregon Land Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at Portland in said district, this 7th day of January, A. D. 1897.

[SEAL.] J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

90 (Endorsed:) No. 348. In the United States circuit court of appeals for the ninth circuit. The Eastern Oregon Land Company, appellant, *vs.* John D. Wilcox. Transcript of record. Appeal from the circuit court of the United States for the district of Oregon.

Filed Jan. 9, 1897. F. D. Monckton, clerk.

91 United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellant,
v.
JOHN D. WILCOX, Appellee. } No. 348.

THE EASTERN OREGON LAND COMPANY, Appellant,
v.
E. I. MESSINGER, Appellee. } No. 349.

Appeal from the circuit court of the United States for the district of Oregon.

Dolph, Nixon & Dolph, for appellant; John M. Gearin and J. L. Story, for appellees.

Before Ross, circuit judge, and Hawley and Morrow, district judges.

HAWLEY, *District Judge:*

Both of these cases present the identical questions that were involved in the case of The Oregon & California Railroad Company *v.* United States, 74 Fed., 67, and are necessarily controlled by the decision in that case. We adhere to the views therein expressed, and upon the authority of that case the judgments and decrees in these cases are reversed, with instructions to the circuit court to enter a decree in favor of the complainant in each case.

(Endorsed:) Opinion. Filed Feb. 23, 1897. F. D. Monckton, clerk.

92 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1896.

THE EASTERN OREGON LAND COMPANY, Appellant,
v.
JOHN D. WILCOX. } No. 348.

Appeal from the circuit court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with instructions to the circuit court to enter a decree in favor of the complainant.

(Endorsed:) Decree. Filed Feb. 23, 1897. F. D. Monckton, clerk.

93 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellee,
vs.
JOHN D. WILCOX, Appellant.

The above-named appellant, John D. Wilcox, conceiving himself aggrieved by the order and decree entered on February 23, 1897, in the above-entitled cause, doth hereby appeal from said order and decree to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

GEARIN, SILVERSTONE & BRODIE,
Attorneys & Solicitors for Appellant.

Portland, Oregon, Aug. 3d, 1897.

And now, to wit, on 3d day of August, 1897, it is ordered that the appeal be allowed as prayed for.

WM. B. GILBERT,
Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

Due service of the foregoing notice of appeal and allowance is hereby admitted made on us in Multnomah county, Oregon, August 7th, 1897.

DOLPH, NIXON & DOLPH,
Att'ys for Appellee.

(Endorsed:) Appeal and allowance. Filed Aug. 11, 1897. F. D. Monckton, clerk.

94 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellee,
vs.
JOHN D. WILCOX, Appellant.

Know all men by these presents that we, John D. Wilcox and C. E. Brown, of the county of Sherman, State of Oregon, are held and firmly bound unto the above-named The Eastern Oregon Land Company in the sum of two hundred and fifty dollars, to be paid to the said The Eastern Oregon Land Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of Aug., 1897.

Whereas the above-named John D. Wilcox has prosecuted an appeal to the Supreme Court of the United States to reverse the

decree rendered in the above-entitled suit by the judges of the United States circuit court of appeals for the ninth circuit:

Now, therefore, the condition of this obligation is such that if the above-named John D. Wilcox shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. D. WILCOX.
C. E. BROWN.

95 STATE OF OREGON, } ss:
County of Sherman, }

This certifies that on this seventh day of August, 1897, before me, the undersigned, a notary public in and for said county and State, personally appeared the within-named John D. Wilcox and C. E. Brown, personally known to me to be the identical parties whose names are signed to the foregoing instrument of writing, and they and each of them acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and
[SEAL.] notarial seal this the day and year in this certificate above written.

CHARLES W. MOORE,
Notary Public for Oregon.

(Endorsed:) Bond on appeal. Filed Aug. 11, 1897. F. D. Monckton, clerk.

96 United States Circuit Court of Appeals for the Ninth Circuit.

THE EASTERN OREGON LAND COMPANY, Appellant,
vs.
JOHN D. WILCOX, Appellee. } No. 348.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing ninety-five (95) pages, numbered from one (1) to ninety-five (95), both inclusive, to be a true copy of the record and of all proceedings in the above-entitled cause, including opinion filed, as the same appear of record in said circuit court of appeals, and that the same constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 17th day of August, A. D. 1897.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

97 UNITED STATES OF AMERICA, ss:

To the Eastern Oregon Land Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington,

on the second Monday in October, 1897, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Eastern Oregon Land Company is appellee and John D. Wilcox is appellant, to show cause, if any notice of appeal there be, why the judgment and decree in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of August, 1897.

WM. B. GILBERT,
Judge U. S. Circuit Court of Appeals for Ninth Circuit.

98 Due service of the foregoing citation is admitted made on use in Multnomah county, Oregon, this 7th day of August, 1897.

DOLPH, NIXON & DOLPH,
Att'ys for the Eastern Oregon Land Company.

99 [Endorsed:] D. No. 348. In U. S. circuit court of appeals, ninth circuit. The Eastern Oregon Land Company, appellee, *vs.* John D. Wilcox, appellant. Citation. Filed Aug. 11, 1897. F. D. Monckton, clerk.

100 In the Supreme Court of the United States.

THE EASTERN OREGON LAND COMPANY, Appellee,
vs.
E. I. MESSENGER, Appellant.

THE EASTERN OREGON LAND COMPANY, Appellee,
vs.
JOHN D. WILCOX, Appellant.

Stipulation as to Printing Record.

The bills, answers, decrees, assignments of error, and all other papers and proceedings in the above-entitled causes being exactly alike, with the exception that in the case of The Eastern Oregon Land Company *vs.* E. I Messinger it is alleged that the land patented to the defendant was patented under the provisions of the act of Congress approved May 20th, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south, of range sixteen east, of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road as designated on the map of August 17, 1870, and that the said patent was dated the 17th day of August, 1894, while in the case of The Eastern Oregon Land Company *vs.* John D. Wilcox it

is alleged that the land patented to him was patented under
101 the provisions of the act of Congress approved April 24, 1820, entitled "An act making further provisions for the sale of public lands," and the acts supplemental thereto; that the lands patented were the northeast quarter and the southeast quarter of section fifteen, township five south, of range seventeen east, of the Willamette meridian, in Oregon, and were situated more than twenty miles and less than forty miles from the line of the general route of the Northern Pacific Railroad Company's road, and that said patent was dated the 28th day of December, 1894—

It is stipulated by the parties to the above-entitled suits, by their respective attorneys, that, unless the above-entitled court shall otherwise order, only the record in the above-entitled suit of The Eastern Oregon Land Company *vs.* John D. Wilcox shall be printed, and that the appeal in the case of The Eastern Oregon Land Company *vs.* E. I. Messinger may be heard and submitted in said court without printing the record thereof.

JAMES K. KELLY,
Solicitors for Appellees.
JNO. M. GEARIN,
Solicitors for Appellants.

102 [Endorsed:] In the Supreme Court of the United States. E. I. Messinger, appellant, *vs.* The Eastern Oregon Land Company, appellee, and John D. Wilcox, appellant, *vs.* The Eastern Oregon Land Company, appellee. Stipulation as to printing record.

103 [Endorsed:] Case No. 16,667. Supreme Court U. S., October term, 1897. Term No., 454. John D. Wilcox, app't, *vs.* The Eastern Oregon Land Co. Stipulation as to printing record. Office Supreme Court U. S. Filed Sep. 15, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,667. U. S. circuit court of appeals, 9th circuit. Term No., 454. John D. Wilcox, appellant, *vs.* The Eastern Oregon Land Company. Filed September 15, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN D. WILCOX, APPELLANT,
v.
THE EASTERN OREGON LAND COMPANY, appellee,
No. 454.

and

E. I. MESSINGER, APPELLANT,
v.
THE EASTERN OREGON LAND COMPANY, appellee.
No. 455.

SUGGESTION BY THE SOLICITOR-GENERAL THAT THE CONSIDERATION OF THESE CASES BE DEFERRED UNTIL CASE NO. 295, THE UNITED STATES v. THE OREGON AND CALIFORNIA RAILROAD COMPANY, SHALL BE SUBMITTED ON ARGUMENT, AND THE THREE CASES BE CONSIDERED BY THE COURT TOGETHER.

The two cases above named are submitted under rule 20.

The suggestion made, on behalf of the United States, is because of this condition: The three cases are appeals from decrees of the Circuit Court of Appeals for the Ninth Circuit, and the principal controlling question is the same in all three cases.

In Nos. 454 and 455 appellees claim the lands involved by virtue of the act of Congress of February 25, 1867 (14 Stats., 409), making a grant of public lands to the State of Oregon in aid of the construction of a wagon road in that State. Performance under the act, by due construction of the road and its acceptance by the governor of Oregon is admitted, and by due conveyance the appellees took the title to the lands in dispute, if they were public lands on February 25, 1867.

These lands lie north of Portland.

The lands in No. 295 lie south of Portland, and are claimed by appellees under the grant made by act of Congress of July 15, 1866 (14 Stats., 239), in aid of a railroad from Portland south to the State boundary line of Oregon.

Due construction and acceptance of this line of railroad by the proper executive officers of the Government is conceded, and appellee and its assigns have complete title to these lands if they were public lands July 15, 1866.

The Northern Pacific Railroad act was approved July 2, 1864.

A certain map, known as the "Perham map," of a projected line of railroad of the Northern Pacific Company was filed in the Interior Department March 6, 1865, but was rejected by the Department. No action was ever taken as to it after this rejection.

On August 4, 1870, a map of "general route" of the Northern Pacific Railroad line between Wallula and Portland was filed and approved, but before this the Oregon and California Railroad had been constructed

and accepted, and also The Dalles Military Road had been constructed and accepted by the governor of Oregon.

The lands in all three cases lie within 40 miles of the line of the map of general route of the Northern Pacific Railroad of August, 1870.

No map of "definite location" of line of the Northern Pacific Railroad was ever filed, nor any road constructed between Wallula and Portland, opposite the lands in question, and the contention of appellees is, as was held below, that, therefore, no right in the Northern Pacific Railroad Company ever attached to any of these lands. That contention growing out of the question as to the legal effect of the Perham map and the map of August, 1870, as to these lands, is the fundamental question common to all three cases.

The Circuit Court of Appeals in deciding the cases of Wilcox and Messinger disposed of them in these words: "Both these cases present the identical questions that were involved in the case of The Oregon and California Railroad Company *vs.* The United States, and are *necessarily controlled by the decision in that case.*"

The italics are mine.

Again: The brief filed by counsel for appellants here in Nos. 454 and 455 is by Mr. John M. Gearin, who was special counsel for the United States in No. 295 in the court below, and is the same in substance on the main question as was filed in No. 295 below.

Again: The argument for appellees here in Nos. 454 and 455 is substantially the same as the argument in No.

295 for defendants below; indeed, a substantial portion of the brief for appellee in No. 295 below is copied into and made part of the brief for appellee in Nos. 454 and 455.

As conceded by Judge Kelly, orally, before the Court on the 15th instant, the United States has a direct and deep interest in Nos. 454 and 455.

As he said, there are over 70,000 acres of land within the conflicting limits of the wagon-road grant which will be affected by the decision of the two cases named.

Nearly 200,000 acres are involved in the controversy in No. 295; and I confidently submit that the Court should have the benefit of the full argument, in all phases, in *all* the cases before *determining* the one happening to be first formally submitted under the rule, upon printed briefs only, and therefore that an order be made that consideration of Nos. 454 and 455 will be deferred until No. 295 shall be reached and submitted.

Opposing counsel in No. 295 concur in this motion.

JOHN K. RICHARDS,
Solicitor-General.

Nos. 454 & 455.

Brief of Gearin for Appl.

Supreme Court

Filed Sept. 7th, 1897.

OF THE UNITED STATES.

THE EASTERN OREGON LAND COMPANY,
Appellee,
vs.
E. I. MESSINGER,
Appellant,
455

AND

THE EASTERN OREGON LAND COMPANY,
Appellee,
vs.
JOHN D. WILCOX,
Appellant.
454

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Appellant's Brief.

JNO. M. GEARIN,
Attorney of Appellant.

PORTLAND, OREGON.
MARSH PRINTING CO., PRINTERS, 120-122 FRONT ST., COR. WASHINGTON.
1897.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE EASTERN OREGON LAND COMPANY, *Appellee*,

vs.

E. I. MESSINGER, *Appellant*,

AND

THE EASTERN OREGON LAND COMPANY, *Appellee*,

vs.

JOHN D. WILCOX, *Appellant*.

BRIEF AND PRINTED ARGUMENT SUBMITTED BY STIPULATION UNDER RULE 20, RULES OF THE SUPREME COURT.

These are appeals from the decrees of the United States Circuit Court of Appeals, for the Ninth Circuit, of date February 23rd, 1897, which decrees reversed the decrees of the Circuit Court of the United States for the District of Oregon of date January 5th, 1897, and directed the said Circuit Court to enter a decree in complainant's favor in each case. The suits in the Circuit Court were to procure a cancellation of two United States patents—one to appellant Messenger, and the other to appellant Wilcox—for certain lands described in the bills. Both cases are presented here together, as they were in the Court of Appeals, by stipulation of parties. The cases are identical, except that in the case against Wilcox the land in dispute is situate more than twenty and less than forty miles from the line of the Northern Pacific Company's railroad, as designated on the map of general

route of said road filed by said company August 13th, 1870, and that in the case against Messenger the land is situated less than twenty miles from said line.

It is alleged in both bills of complaint that the lands embraced in these patents lie within the limits of the lands granted to the State of Oregon by act of Congress of February 25, 1867, for the construction of a wagon road from Dalles City on the Columbia River, to a point on Snake River, opposite Fort Boise, in Idaho Territory.

That on October 20th, 1868, the legislature of the State of Oregon granted to the Dalles Military Road Company all lands, rights of way, rights and privileges pledged to the State of Oregon by said act of Congress, and designated the Dalles Military Road Company as the company to receive said grant. That prior to June 23d, 1869, the Dalles Military Road Company surveyed and definitely located the line of its wagon road between the points and upon the route designated in said act of Congress and in said act of the legislative assembly of the State of Oregon, and completed said road, and the same was approved and accepted by the governor of the State of Oregon.

That The Dalles Military Road Company, on the 31st day of May, 1876, sold said land grant to Edward Martin, and that the complainant, the Eastern Oregon Land Company, by mesne conveyances became the purchaser of said land grant from Edward Martin.

These facts are all admitted in the answers. But it is alleged by appellants that at the time of the passage of the act of Congress on the 25th day of February, 1867, the lands in dispute were not public lands subject to grant by Congress, inasmuch as they had prior to that time, to wit, on the 2nd day of July, 1864, been granted to the Northern Pacific

Railroad Company, and that therefore as to these lands The Dalles Military Road Company took nothing by the act of Congress of February 25th, 1867, or act of the Legislative Assembly of the State of Oregon of October 20th, 1868.

It is admitted by the appellees that in the case of the Company against Messenger the land in controversy is situated within twenty miles of the line of the Northern Pacific Company's railroad as designated on the map of the general route of said road, filed by said company August 13th, 1870; and that in the case against Wilcox the land is situated more than twenty miles and less than forty miles from said line.

After the passage of the act of Congress of September 29th, 1890, entitled, "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and other purposes," a large body of land including the land in dispute, was thrown open to settlement, and on the 28th day of September, 1894, the United States sold to John D. Wilcox the land claimed by him, and on that day executed to him a patent therefor, and on the 17th day of August, 1891, sold to E. T. Messenger the land claimed by him and executed to him a patent for the same.

The Circuit Court held that the lands in controversy, being within forty miles of the line of the Northern Pacific Railroad Company's road, as shown upon its map of general route, were not public lands subject to grant by Congress February 25th, 1867, and that consequently neither the State of Oregon nor The Dalles Military Road Company took any title to or interest in said lands by said act, and dismissed complainant's bills. The Court of Appeals reversed these decrees, and directed the lower court to grant decrees in favor of complainant in each case. From such holding these appeals are taken.

The legislation referred to in the bill and necessary to be considered in this case is as follows:

Congress passed and the President approved, on July 2d, 1864, an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route." (13 U. S. Statutes, p. 365).

The portions of said act material to be considered herein are:

Sec. 3. And be it further enacted: that there be and hereby is granted to the Northern Pacific Railroad Company its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public lands not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emptions or otherwise claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office: And whenever prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in

lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act. Provided, further, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections, nearest to the line of said road may be selected as above provided: And provided further, That the word 'mineral," when it occurs in this act, shall not be held to include iron or coal: And provided further, That no money shall be drawn from the treasury of the United States to aid in the construction of the said Northern Pacific Railroad."

Sec. 4. And be it further enacted: That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in

all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company *confirming to said company the right and title of said lands*, situated opposite to, and coterminus with said completed section of said road, and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of road is completed as aforesaid; provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota until the whole of said railroad shall be finished and in good running order as a first class railroad from the place of beginning on Lake Superior to the western boundary of Minnesota

* * * * * *

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; (b) and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, shall be, and

the same *are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.* And the reserved alternate sections shall not be sold by the Government at a price less than *two dollars and fifty cents per acre when offered for sale.*

Sec. 8. And be it further enacted, That each and every grant, right and privilege herein, are so made and given to and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the fourth day of July, Anno Domini 1876.

Sec. 9. And be it further enacted that the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same upon the further condition, that if the said company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then in such case, at any time thereafter, the United States by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

On April 10, 1869, the following joint resolution was adopted. (16 Stat. U. S., p. 57):

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions; and said Company in respect thereto, being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional or amendatory thereof, provided that said company shall not be entitled to any subsidy in money, bonds or additional lands of the United States, in respect to such extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension, as it may be located; and provided further that at least twenty-five miles of said extension shall be constructed before the 2d day of July, 1871, and forty miles per year thereafter until the whole of said extension shall be completed."

On May 31, 1870, Congress adopted the following joint resolution. (16 U. S. Stat., p.378):

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be and hereby is authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on the property and rights of property of all kinds and de-

scriptions, real, personal and mixed, including its franchises as a corporation; and as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; also to locate and construct under the supervisions and with the privileges, grants and duties provided for in this act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land belonging to the United States, and designated by odd numbers in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch except mineral, and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, subsequent to the passage of the act of July 2, 1864, and that twenty-five miles of said main line between its western terminus and the City of Portland, in the State of Oregon, shall be completed by the 1st day of January, A. D. 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points, etc."

On February 25, 1867, Congress passed and the President approved "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River."

Section 1 of said act is as follows:

"That there be and hereby is granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Canyon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road; provided, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses. And provided further, That any and all lands heretofore reserved to the United States or otherwise appropriated by act of Congress or other competent authority, be and the same are hereby reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same in which case the right of way to the width of one hundred feet is granted. And provided further, That the grant hereby made shall not embrace any mineral lands of the United States."

On September 29, 1890, Congress passed and the President approved an act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." (26 U. S. Statutes, p. 496):

The following sections of said act are material in this case:

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there is hereby forfeited to the United States, *and the United States hereby resumes the title thereto*, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminus with the portion of any railroad not now completed and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; Provided, That this act shall not be construed as forfeiting the rights of way or station grounds of any railroad company heretofore granted.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the "Harrison line," being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven (27), in township seven (7) north, of range thirty-seven (37) east of the Willamette Meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July 1, 1885, or who at said date were in possession of any portion of said lands, or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to

the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the City of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8, 1885, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the Legislative Assembly of the State of Oregon, approved November 25, 1885, providing for the means to supply the City of Portland with an abundance of good, pure and wholesome water over and across the following described tracts of land: Sections nineteen (19) and thirty-one (31), in township one (1) south, of range six (6) east; sections twenty-five (25), thirty-one (31), thirty-three (33) and thirty-five (35), in township one (1) south, of range five (5) east; sections three (3) and five (5), in township two (2) south, of range five east; section one (1), in township two (2) south, of range four (4) east; sections twenty-three (23), twenty-five (25) and thirty-five (35), in township one (1) south, of range four (4) east, of the Willamette Meridian, in the State of Oregon, *forfeited by this act* are hereby confirmed unto the said City of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections, for the purpose of constructing, maintaining and repairing a water-pipe line aforesaid.

Sec. 6. *That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any state or corporation to which lands may have been granted by Congress, except as herein otherwise provided;* nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to an uncompleted road,and hereby forfeited,within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

The Northern Pacific Railroad Company filed two maps of its road relating to these lands.

First—The map of March 6, 1865: "The Perham map, Exhibit "B." The letter of Josiah Perham, president of the Northern Pacific Railroad Company accompanying this map, together with the letter from the Secretary of the Interior, transmitting the same to the Commisioner of the General Land Office, and the Commissioner's reply, are to be found on pp. 64 to 72, Transcript of Record herein.

Second—The map of August 13, 1870, pleaded in complainant's bill, pp. 22 and 23, Abstract Record.

ARGUMENT.

It is urged in the brief filed by appellee in this case that appellee in any view of the matter, was entitled to "notice" under the provisions of Section 5 of the act of Congress, entitled "An Act to provide for the adjustment of land grants made by Congress *to aid in the construction of railroads*, and for the forfeiture of unearned lands, and for other purposes," approved March 3d, 1887.

But this position is not correct. That was a piece of legislation referring exclusively to land grants *to aid in the construction of railroads*. It is so liminted in the title. Sections one (1) and two (2) of the act are as follows:

"Section 1. That the Secretary of the Interior be and is hereby authorized and directed to immediately adjust in accordance with the decisions of the Supreme Court *each of the railroad land grants* made by Congress to aid in the construction of railroads, and heretofore unadjusted.

"Section 2. That if it shall appear upon completion of such adjustments respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, *to aid in the construction of a railroad* it shall be the duty of the Secretary, &c."

Section five of this act, relied upon by appellee, provides for innocent purchasers from the railroad company. But there are no innocent purchasers from any railroad company in this case.

It is the uniform holding in the Department of Justice

that this act applies only to railroad land grants. In the Department of the Interior also this construction of the act obtains.

In the contest of Rufus H. King vs. The Eastern Oregon Land Company, the Department of the Interior made the following decision December 26th, 1896:

Department of the Interior,

Washington, D. C., December 26, 1896.

Rufus H. King,

vs.

The Eastern Oregon Land Company.

Railroad Land Act of March 3, 1887.

The Commissioner of the General Land Office:

Sir—The land in this controversy is the southeast quarter of section 27, township 2 south, of range 16 east, The Dalles Land District, Oregon, and is within the limits of that portion of the grant made by the act of July 2, 1864, (13 Stat., 356,) to the Northern Pacific Railroad Company, which was forfeited by act of September 29, 1890, (26 Stat., 496,) as well as within the limits of the grant made by the act of February 25, 1867, (14 Stat., 409,) to aid in the construction of The Dalles Military Road.

The grant to the Northern Pacific Road being prior, defeated the grant to The Dalles Road, to the extent of the overlap, and your office included the unpatented lands in said limits in the restoration of the forfeited lands of the Northern Pacific Railroad. Under this restoration Rufus H. King made homestead entry No. 4922 of said land, on October 1, 1893, and made proof on the day appointed there-

for. The Eastern Oregon Land Company filed a protest against the admission of such proof, claiming a prior right, as a purchaser from The Dalles Military Road Company, and by reason thereof, the preference right to purchase said land, under the act of March 3, 1887, (24 Stat., 556).

The entryman made proof, and evidence was submitted by the protestant in support of its claim. On July 20th, 1895, the local office decided in favor of the entryman.

The Company appealed. Your office on April 23, 1896, reversed the decision of the local officers and sustained the company's protest.

The entryman appeals to the Department. The question arises: Does the act of Congress of March 3, 1887, supra, entitled, "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned land, and for other purposes," extend to lands granted to the State of Oregon, to aid in the construction of wagon-roads in said State?

It is a rule of construction that remedial statutes are to be liberally constructed so as to suppress the mischief and advance the remedy. But this rule is only applicable when the words of the statute will admit of its application.

When they are plain and clearly define its scope and limit, construction cannot extend it. "If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreaing it."

Southerland on Statutory Construction, p. 430, p. 556.

The statute under consideration is plain, precise and un-

ambiguous, and, by its terms, only applies to grants of land to railroads.

It has recently been held by the Department that said act "relates specifically to the adjustment of railroad grants," and that it does not apply to a suit instituted for the recovery of title to lands certified on account of a wagon road grant in the State of Oregon.

California and Oregon Land Company, 22 L. D., 170.

I am therefore of the opinion that the decision of the register and receiver, recommending that King's entry be approved for patent and the company's protest dismissed, should be affirmed.

Your office decision is reversed, and the papers are herewith returned.

Very respectfully,

DAVID R. FRANCIS,

Secretary.

See also Secretary's Decisions in

16 Land Decisions, pp. 459-461.

17 Land Decisions, pp. 432-437.

LATERAL LIMITS OF THE GRANT.

It is claimed in counsel's brief that the grant to the Nor-

thern Pacific Railroad Company in no event could exceed twenty miles from the line of the road in a State; and this without regard to whether the line of the road was in the State or in an adjoining Territory. This is not the language of the act, and is not the construction put upon it by the Land Department or the Courts.

The act of July 2nd, 1864, reads, "to the amount of twenty alternate sections per mile on each side of said railroad line as said Company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State."

In the case of Denny vs. Dodson, 32 Federal Rep., p. 910, Judge Deady, having this same grant to the Northern Pacific Railroad before him for consideration, says:

"But independently of this consideration, there does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a Territory or in a State. If in the former, the grant has twice the extent that it has when located in the latter. It is the place of location which determines this matter. The nearness of the line to any other Territory or State has nothing to do with it. Such an understanding has been the uniform ruling of the Department and that mode of determining the lateral extent of the grant is the only practicable one."

In construing grants by the Government of this nature the rule is settled that as between the Government and the grantee company the construction will be against the grantee. In R. R. Co. vs. Litchfield, 23 How., 66, the Supreme Court says:

"All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands upon the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied."

This language is quoted and approved in Leavenworth R. R. Co. vs. U. S., 92 U. S., 733, and the Court there adds:

"And if a right be asserted against the Government it must be so clearly defined that there can be no question of the purpose of Congress to confer it. In other words, what is not given expressly or by necessary implication is withheld."

PUBLIC LANDS.

The grant to the State of Oregon of February 25, 1867, is "alternate sections of public land."

It is clear that if the lands, title to which is involved in this controversy, were not "public lands" on February 25, 1867, they did not pass to the State under the act.

The Supreme Court of the United States has in every case where the question was presented to it as to what were "*public lands*" within the meaning of railroad land grant acts, decided that this term did not include lands reserved

for any purpose or in any manner or to which a claim of any kind whatever had attached.

In Wilcox vs. Jackson, 13 Peters, 498, 513, the Court said:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation was made of it."

In Leavenworth R. R. Co. vs United States, 92 U. S., 733, the Supreme Court quotes this portion of the opinion in Wilcox vs. Jackson, and adds:

"It may be said that it was not necessary for the Court in deciding the case to pass upon this question, but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction. * * * * * "Every tract set apart for some special use is reserved to the Government, to enable it to enforce that use. And there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the Government to see that neither class of reservations is deviated from the uses to which it is assigned."

In Newhall vs. Sanger, 92 U. S., 761, the question again came up and the Court said:

"The subject of grants of land to aid in constructing works of internal improvement was fully considered at the present

term, in Leavenworth, Lawrence & Galveston R. R. Co. vs. U. S., (Ante, 634).

"We held that they attached only to so much of our national domain as might be sold or otherwise disposed of, and that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves. Our decision confined a grant of every alternate section of "land" to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could, on the location of the road, the order withdrawing lands from pre-emption, private entry and sale, apply."

In Kansas City Ry. Co., Dunmeyer 113, U. S., 629, the Court held that a homestead entry having attached previous to the grant to the railroad company took the lands out of the grant, although the entryman abandoned his claim."

Mr. Justice Miller, delivering the opinion, said:

"It is argued by the company that, although Miller's homestead entry had attached to the land, within the meaning of the excepting clause of the grant, before the line of definite location was filed by it, yet when Miller abandoned his claim, so that it no longer existed, the exception no longer operated, and the land reverted to the company—that the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception.

"We are unable to perceive the force of this proposition."

* * * * * *

"No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes which have been given up or abandoned as such reservation, and were of great value. Nor is it understood that, in any case where lands have been otherwise disposed of, their reversion to the government brought them within the grant."

* * * * * *

"Of all the words in the English language this word attached was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

Mr. Justice Field dissented in the Leavenworth case .92

U. S., 733, supra, but subsequently in Bardon vs. The Northern Pacific Railroad Company, 145 U. S., 535, he wrote the opinion of the Court, and says:

"Three justices, of whom the writer of this opinion was one, dissented from the majority of the Court in the Leavenworth case; but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

* * * * * *

"Land to which any claim or right of others has attached does not fall within the designation of public land."

R. R. Co. vs. Whitney, 132 U. S., 357.

R. R. Co. vs. Alling, 99 U. S., 463.

Van Wyck vs. Knevals, 106 U. S., 360.

Desert Salt Co. vs. Tarpey, 142 U. S., 241.

N. P. R. R. Co. vs. Sanders, 49 Fed. Rep., 132-3.

U. S. vs. N. P. R. R. Co., 41 Fed. Rep., 845.

Denny vs. Dodson, 32 Fed. Rep., 903.

Upon this point we particularly call the Court's attention to the language of the Supreme Court in the case of the United States vs. Northern Pacific Railroad Company, 152 U. S., 284.

In that case the Court had this Northern Pacific grant before it—the grant by the joint resolution of May 31, 1870, insofar as the same affected lands between Portland and Tacoma.

The lands in dispute in that case had been granted to the Oregon Central Railroad Co., May 4th, 1870. This grant was forfeited January 31, 1885. The lands were also included in the grant to the Northern Pacific Railroad Company by the resolution May 31, 1870. The Northern Pacific Company claimed that by reason of the forfeiture of the grant to the O. & C. these lands went to them. But the Court held otherwise, and said. (Page 298-9):

"So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly one month, attached, as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location the lands in question *had been disposed of by the United States* prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, *they were not public lands* within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were, consequently, excepted out of that grant as having been *previously* disposed of by the United States.

When, therefore, Congress by the act of 1885, forfeited to the United States and restored to the public domain so much of the lands granted by act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, *the United States was reinvested with the title for its own benefit exclusively.* And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870."

This decision is directly in point. If the lands in that case "were not public lands within the meaning of the grant of May 31, 1870," because they "had been disposed of by the United States" by act of May 4, 1870, certainly the lands involved in this controversy "were not public lands within the meaning of the" act of February 25, 1867, because they "had been disposed of by the United States," by the act of July 2, 1864.

As to these lands, therefore, the State of Oregon took nothing by its grant of February 25, 1867, and the patents described in the bill should not be cancelled.

U. S. vs. Stone, 2 Wallace, 525.

The grant to the Northern Pacific Railroad Company was by the act of July 2, 1864, and not by the Joint Resolution of May 31, 1870.

It has been claimed that, as to lands on the "branch"

from Wallula to Portland, there was no grant of lands until the passage of the joint resolution of May 31, 1870.

It will be observed that in section three of the act of July 2, 1864,—the section which makes the grant—the words "main line," or "branch," do not occur. There is no qualification to the grant as applying to the "main line" only. It is claimed now that designating one portion of the road "Main Line" confers upon that portion greater rights than are to be accorded to the "branch." This contention is not sound. The term "Main Line" is not a distinction, but a description merely. It is used in the first section of the act. The line from Lake Superior to Puget Sound is called the main line, and the line running down from the main line to Portland is called the branch. These lines were so designated presumably on account of their relative length. The terms "long line" and "short line" would have answered the purpose equally as well. Why the terms "main line" and "branch" were chosen it is unnecessary to consider, except to say that they are appropriate. No change was made up to the passing of the joint resolution of May 31, 1870. Up to that time the building of the road had not progressed. No power was given by the act of 1864 to *mortgage the land grants*. It was found that without such power funds could not be obtained to carry on the work. Hence the resolution of May 31, 1870. The joint resolution of April 10, 1869, was a useless piece of legislation, and the company did not act under it, because while it authorized the extension of the branch from Portland to the Sound, it made no land grant for such extension and gave no right to mortgage anything but the right of way, roadbed and telegraph line, which power was given by the act of March 1, 1869.

By that time it was also found to be advantageous to build down the valley of the Columbia to Portland, *and from Portland to Puget Sound.* Portland was then the metropolis of Oregon and the largest city in the Northwest. The towns which have since grown to be cities on the Sound were small, and in the way of furnishing business for a railroad were comparatively unimportant. It was desirable, therefore, to build to Portland first, to the end that business might be secured at once for the new road. There was another reason. It was well known to those whose business it was to find out, that a road from the Upper Columbia over the Cascade Mountains to Puget Sound would be very difficult to build, and it was doubted whether a pass would be found through the Cascades and whether it would be possible to ever build the portion of the road from Wallula over the mountains to the Sound. The object of the act of 1864 being to connect the East with the Pacific Ocean, if the line over the Cascades failed the road must necessarily run down the valley of the Columbia to Portland, and thence to Puget Sound. In order to provide for the building of this road a new land grant was necessary—*from Portland to the Sound.* The joint resolution of 1869 gave the company the right to build this extension, but made no grant of lands, and it failed. Therefore, in the joint resolution of May 31, 1870, we find this provision:

"Also to locate and construct under the provisions and with the privileges *grants* and duties provided for in this act of incorporation its *main road* to some point on Puget Sound *via the valley of the Columbia river* with the right to construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

The reason why the terms "branch" and "main line" in the act of 1864 were transposed in this joint resolution is not apparent unless Congress and the company, knowing that the line down the valley of the Columbia *could* be built, and being uncertain of the feasibility of building over the Cascades, proposed to designate that portion "main line" which was most likely to be constructed.

Attention has been called to the fact that in the indemnity clause in the resolution of May 31, 1870, these words occur: "To the amount of lands that have been *granted* sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of *subsequent to the passage of the act of July 2, 1864.*"

It is claimed that these italicised words "*subsequent to the passage of the act of July 2, 1864,*" refer to all the lands from Wallula down. This is unreasonable. If these words apply to the lands from Wallula to Portland, they apply to the lands from Wallula across the mountains to the Sound, and there was no grant to the line of road over the mountains by the act of 1864. And nobody has ever claimed that. The indemnity for lands "granted subsequent to the passage of the act of July 2, 1864," referred solely to the new grant from Portland to the Sound. It was intended that this new grant from Portland to the Sound should stand on the same footing with the old grant.

This is the more apparent from what immediately follows in the resolution:

"And that twenty-five miles of said main line between its Western terminus and the City of Portland, in the State of Oregon, shall be completed by the first day of January, 1872,

and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points."

It was claimed in the argument in the Court below that the decision of the Supreme Court in United States vs. The Northern Pacific Railroad Company, 152 U. S., 284, sustains appellees' contention in this regard. But that case holds nothing of the kind. The controversy in that case was over lands lying between Portland and Puget Sound upon the line of road not provided for by the act of 1864, but authorized by the joint resolution of 1870, and the Court said, (p. 294):

"We cannot agree that this resolution is to be held in this respect as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound with the right to obtain lands in aid thereof as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a new road not before contemplated that would directly connect Portland and its vicinity with Puget Sound."

This decision, we insist, not only does not sustain appellees' position, but is a conclusive refutation of that claim.

THE PERHAM MAP.

The map of the general route, filed by the Company March 6, 1875, is known as the Perham Map. As to the lands

granted to the Company for the branch from Wallula to Portland, this map is sufficient as a map of general route. It is not necessary to consider whether it is sufficiently definite on the main line farther East.

In Buttzz vs. The Northern Pacific Railroad Company, 119 U. S., p. 55, the Supreme Court had under consideration this very act of July 2, 1864, and was passing upon the point raised by counsel as to when the general route of the road might be considered as fixed. In deciding that point the Court uses this language:

"The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line, as fast as may be requried for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country, *or from a knowledge of it* and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the In-

terior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove useless."

In St. Paul and Pacific R. R. Co. vs. The Northern Pacific R. R. Co., 139 U. S., p. 19, the Court, in construing this act of July 2, 1864, says:

"It is indeed contended that there is no evidence that any general route was fixed, meaning thereby the general route for the whole length of the road. If this were the fact, which is not conceded, the result would not be changed, as supposed by counsel. The contemplated railroad from Lake Superior to Puget Sound was about two thousand miles in length, and it was not expected that there should be a general designation of the whole route over this distance before any land should be withdrawn or any rights of the company should attach. The general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company. The withdrawal in any

case would extend along the route which was fixed, and a map of which was filed in the department."

Under these authorities this Perham map, insofar as the grant from Wallula to Portland is concerned, was such a map of general route as was contemplated in the third section of the act of 1864. It was, from the nature of the country, practically the only map that ever could be filed. True, no withdrawal of lands was made by the Commissioner of the General Land Office upon the filing of this map. But the action of the land department with reference to the map is not important. There is no provision in the act of 1864 that contemplates an approval of the map of general route by the Commissioner of the General Land Office or the Secretary of the Interior. The act contained a legislative withdrawal within itself upon the *filing of the map*. In this respect it differed from nearly all the land grant acts up to that time.

And it was this difference, or in the overlooking of it rather, that led the Commissioner of the General Land Office into the error contained in his letter to the Secretary of the Interior of June 22, 1865. Transcript of Record, pp. 68-69

This is sufficiently shown by comparing the description of a map of general route in Bultz vs. Northern Pacific R. R. Co., supra, and the commissioner's description, which is:

"The evidence required of the route under the established ruling of the department is a *connected map* showing the exact location; the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee. That proof is required to show the precise portions of each section, or smallest legal subdivisions cut by the route."

The commissioner was evidently mistaken as to what contituted a map of general route under the act. But this mistake could not affect the company. The company had filed its map, and by so doing had complied with the act. The refusal of the Commissioner to order a withdrawal upon the filing of this Perham map, so far as the branch road is concerned, did not defeat the legislative withdrawal provided for in the act upon the filing of such a map. The rights of the company were the same irrespective of the action of the Commissioner.

"It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do and he fails to obtain his right by the misconduct or neglect of a public official, the laws will protect him."

Lyttle et al vs. The State of Arkansas, 9, How., 333.

Shepley vs. Cowan, 91 U. S., 339.

This map remained on file in theLand Department as a public record. It must be presumed that the act of February 25, 1867, was passed by Congress with a full knowledge of the existence of this map and its legal effect, and that the State of Oregon took its grant with a like knowledge.

In 1867, when the State of Oregon took its grant, the Northern Pacific Company had a qualified title to these lands by the location of the branch road "down the valley of the Columbia," by the act of 1864, and by the filing of the Perham map, and a survey or filing of any other map was necessary only to particularize the odd sections within the limits of the grant.

In construing the acts of 1864 and 1867 it is the duty of

the Court to ascertain and give effect to the intention of Congress in passing those acts.

U. S. vs. Southern Pacific Co., 146 U. S., 570.

Winona & St. Paul R. R. Co. vs. Barney, 113 U. S., 618.

Considering the length of the road, the condition of the country through which it passed, the difficulties, engineering and financial, which attended its construction at all, the length of time allowed for its construction—twelve years by the act (subsequently increased to sixteen years)—it would be unreasonable to assume that Congress within three years from the passage of the act, intended to take away any portion of the land granted the Northern Pacific Company.

Title to these lands was vested by the act in the Northern Pacific Company upon condition subsequent, and that title remained in said Company until Congress declared a forfeiture of it for the non-performance of such condition subsequent. No person or corporation could assert any valid claim to said lands until after such forfeiture was declared.

Schulenberg vs. Harriman, 21 Wallace, 63.

Something is claimed by reason of the acquiescence of the Northern Pacific Company in the refusal of the Commissioner to order a withdrawal on the Perham map. But there was no acquiescence. The commissioner declined to order a withdrawal, and there was no law to compel him to do it. The Company kept on asking for withdrawal, and endeavoring in every way to the best of its abiltiy to overcome the objections of the Land Office.

THE WORD "GRANTED" IN THE EXCEPTIONS TO THE GRANT IN SEC. 3 OF THE ACT OF 1864.

It is claimed by appellant that it is aided by the exception contained in the grant of July 2, 1864, and that where the act excepts out of the grant lands "reserved, sold, *granted* or otherwise appropriated," etc., Congress had in contemplation this subsequent "*grant*" to the State of Oregon," or some similar one. On principle this is unsound. By authority it is completely overthrown. The law is settled by the Supreme Court that the exceptions in a grant to a railroad company are not for the benefit of, and cannot be taken advantage of by, another railroad company with a subsequent grant, where the two grants conflict.

In the case of the M. T. & K. Ry. Co. vs. The K. & P. Ry. Co., 97 U. S., 491, the reservation was of "lands" sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached ,and "mineral lands." And the Court, speaking of this reservation in the grant says: "It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads."

It will not do to say that this is dictum. It is *not* dictum. The very question, and the only question in that case was, as to the right of two railroads under conflicting grants. One road received its grant in July, 1862, the other in March, 1863.And the Court said, speaking of the grant of 1863:

"Upon the principle already announced in considering the time when the grant to the plaintiff took effect, the title of the defendant to the lands thus set apart to it, had there been no previous disposition or reservation of them, would have become perfect and by relation have vested from the date of the act. But so far as the lands were identical with those covered by the previous grant to the plaintiff by the acts of 1862 and 1864 the title could not attach, as it had already passed from the Government."

True, the word "granted" is not included in the description of the lands reserved, but certainly it is no stronger word than the words used, and might well be included in the phrase "or otherwise disposed of." If the lands in that case were not reserved out of the grant it is difficult to see why they should be in this.

But that there may be no question as to the proper construction of this reservation in the act of July 2, 1864, we ask the Court's consideration of the case of the St. Paul and Pacific Railroad, 139 U. S., pp. 1 to 19.

The facts in that case were as follows:

By the act of March 3, 1857, lands were granted to the Minnesota and Pacific Railroad Company, which afterwards became the St. Paul and Pacific. Some of the lands thus granted were the same as those afterwards granted to the Northern by act of July 2, 1864.

The route of the M. & P. Ry. was subsequently changed by joint resolution of Congress, July 12, 1862.

By act of Congress, March 3, 1865, this joint resolution was repealed, and the lands granted by the act of 1857 were again granted to the St. Paul and Pacific Company.

By act of Congress, March 3, 1871, the route of the St. Paul and Pacific was again changed, and other lands granted it in consideration of its reliquishing those previously granted on certain portions of its route. The identical point was raised there as here, namely, that the grant to the Northern Pacific reserved lands which might subsequently be granted to some other Company, as they were in that case subsequently granted to the St. Paul and Pacific. The Supreme Court holds against such a construction, and says: "But independently of this conclusion we are of opinion that the exception in the act of making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embod a provision which would often be repugnant to and defeat the grant itself."

This decision is conclusive of the question raised here. This is certainly not dictum. By reference to this case, as it was tried and decided in the Court below, it will be seen that the very point urged here was relied on there, and that the decision of the case in a great measure depended on the decision of that point. The case is reported in the 26th Fed. Rep., 551, and for the convenience of the Court we quote the following from the opinion, pp. 557, 558:

"Assuming the priority of the Northern Pacific grant, it is earnestly contended that by its terms all subsequent grants made prior to the definite location of its road are excepted. The definite location, it is conceded, was not made until after the act of 1871. The difference between the language of the grant to the Union Pacific, construed in 97 U. S., supra, and that in the grant to the Northern Pacific, is the basis of this argument. The former grant reads thus:

"Five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

12 St. at Large, 492, Sec. 3.

In the latter we find these words:

"And whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, or prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The question is as to the intent of Congress in these acts; for as to its power as owner to dispose of these lands as it pleases, there can be no question. In Missouri, K. & T. Ry. Co. vs. Kansas Pacific Ry. Co., 97 U. S., 497, the Supreme Court said:

"It is always to be borne in mind in construing a congressional grant that the act by which it is made a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should

not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that where no such power exists, instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield to this, as in all other causes, to the legislative will."

We are not limited, therefore, to the technical force and meaning of terms as used in conveyances and contracts between individuals. We must construe this act as any other law of Congress, and ascertain from all means at command the intent of the legislator. Stress is laid on the use of the word "granted" in the one act, and its omission from the other. This word, it is claimed, has a well-recognized meaning in the land legislation of Congress, distinct from "sale," "pre-emption" and "homestead." Its use indicates the intention of future grants within this territory, and notifies the grantee that such future grants, if made before its definite location, will have precedence. In fact it reserves from this all such future grants. The vastness of this grant, and the wide range given for the location of the road, are suggested as the reasons why Congress increased the exceptions previously made to the Union Pacific act. The fact, as stated, that this is the only land grant act in which this word is used in a similar connection is noticed as evidence of the intent. At the hearing, the arguments in favor of these views were forcibly presented and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., supra, places all land grant roads on the same plane

—and that, a different one from that occupied by settlers and private purchasers—and settles all conflicts of title by a rule clear, simple and just, viz: priority of grant. Congress may fairly be regarded as standing indifferent between all roads, and intending to apply this just and simple rule of priority as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the latter beneficiary averring such departure. The language of each act is broad, and covers every possible disposition by the Government intermediate the act and the location. "Sold, reserved, or otherwise disposed of" in one, "reserved," sold, *granted* or otherwise appropriated" in the other. Is any term broader or more comprehensive than "disposed of?" Used in a similar private contract between individuals, would anyone doubt the sweep of the exception? Yet the Supreme Court ruled that it did not except "any portion of the designated lands for the purpose of aiding in the construction of other roads." Counsel would limit the scope of the term on the principle *noscitur a sociis*. The use of the qualifying word "otherwise" makes against the application of that principle. But, giving it full force, is not a grant a disposition kindred to a sale, if not a reservation? Counsel's argument rests on the technical force of the phraseology, while I understand the Supreme Court to base the rule on the presumed attitude of Congress towards such public improvements. While the grant is vast, the line to be constructed in order to earn it is continental. The grant was made because Congress believed the public good required the road, and in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it

is fairer to presume that Congress intended the freest bounty, rather than to believe that it burdened the grant with extra exceptions, which, when construction became feasible, might largely deplete it of value. Further, Congress had in thought at the time other railroad grants,and in the first proviso made special provision therefor. It there deducted from this grant any lands theretofore granted to any road whose line should prove to be upon the same general route, and authorized consolidation of companies. Without consolidation, the Northern Pacific would fail of such lands, and that without any right of indemnity elsewhere along its line. If further special provision for conflict with other land grants was intended, would not such intention have been made manifest by further proviso, or at least by language of unmistakable import? I can but think the rule laid down in 97 U. S., supra, applicable to the Northern Pacific land grant, and therefore must hold that its title to the lands in place antedates that of the defendant."

In the light of these authorities counsel's position is untenable. These lands were not reserved out of the grant to the Northern Pacific Company because of the use of the word "granted," and the State of Oregon took nothing by the act of 1867, as far as these particular lands are concerned.

Upon this point we call the Court's attention to the decision of the Supreme Court in the case of the United States vs. The Southern Pacific Co., 146 U. S,. 570.

This Court is familiar with the facts in that case. In deciding the case the Supreme Court says (pp. 604-6-7):

"Again, it is urged that the grant to the Atlantic and Pacific Railroad Company having been forfeited, there is noth-

ing now in the way of the Southern Pacific Railroad Company's grant attaching to these lands; that in the interpretation of rights under land grants, regard has always been had by this Court to the intention of Congress; that it was the intention of Congress that these lands should pass to some Atlantic and Pacific Railroad Company or the Southern Pacific Railroad Company; that they cannot now be applied to aid in the construction of the former company's road; and that, therefore, to carry into effect the intent of Congres, they should be applied to aid in the construction of the latter company's line. We think this contention is erroneous, both as to the law and to the intent of Congress.

* * * * * *

"Indeed, the intent of Congress in all railroad land grants as has been understood and declared by this Court again and again, is that such grants operate at a fixed time, and shall take only such lands as at that time are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands."

* * * * * *

"Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Con-

gress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture of its own benefit"

THE JOINT RESOLUTION OF MAY 31, 1870.

It was urged on the trial in the Court below that the joint resolution of May 31, 1870, was not an amendment to the act of 1864, but was a "complete piece of legislation" in itself.

This, we submit, is not correct. This resolution could not stand alone. Without reference to the act of 1864 it is a meaningless thing. In interpreting this resolution reference must be constantly made to the act of 1864. It starts out by authorizing the company to issue bonds and "secure the same by mortgage upon its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchises as a corporation." To what "property" and "franchises" is reference made here? Without the act of 1864 there could be no answer. It refers to the "priv-

ileges, grants and duties provided for in its act of incorporation." What privlieges, grants and duties? Again the answer is found in the act of 1864.

All that this resolution does is to amend the act of 1864 by:

First—Authorizing the company to mortgage its land grant (which before it could not do).

Second—Changing the designation of the road down the Columbia River from "Branch" to "Main Line," and the road across the Cascades from "Main Line" to "Branch."

Third— Providing an additional ten miles on each side of the line of the road for indemnity lands.

Fourth—Making a new grant from Portland to Puget Sound.

Otherwise the act of 1864 remains in full force and effect, and all the other sections of the act of 1864 apply to the new grant from Portland to Puget Sound.

This resolution is a legislative recognition of the right of the company to these lands.

By authorizing the company to mortgage them Congress indicated clearly enough that it was not then understood that any other company had any right to them. As was said by the Circuit Judge in

Denny vs. Dodson, 32 Fed. R., 903.

"But, in advance of the construction of the road and telegraph line, or of particular portions, the lands could not be used without the permission of Congress, so as to cut off the rights of the United States mentioned above. Such per-

mission was given when, on the thirty-first of May, 1870, by joint resolution of the two houses, Congress authorized the company to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property, of all kinds and description, real, personal, and mixed, including its franchise as a corporation. In the property mentioned, the lands granted to the company are included. It can hardly be supposed that Congress would have allowed this mortgage if the company had no legal title to the lands which could be held as security for the moneys advanced on the bonds and transferred by sale upon foreclosure, in case default should be made in their payment. To suppose that Congress would sanction such a proceeding would be to impute to it complicity in a fraud, which cannot be entertained for a moment. The conclusion follows that it allowed the execution of the mortgage because it had transferred to the company a title to the lands covered by its grant, which could in this way be made available to raise funds for the work."

THE MAP OF AUGUST 13, 1870.

It is immaterial whether we call the map of 1870 a map of "general route" or of definite location." So far as appears it was filed as soon as it was practicable to file it. Insofar as concerns the road from Wallula to Portland, it is identical with the Perham map. Under this map a withdrawal of all these lands was ordered by the officers of the Land Department. This map is a recognition of the Perham map, and

shows that there was a legislative withdrawal at the time of filing the Perham map. Any uncertainty or change as to the main line did not affect the branch line, which remained unchanged from the beginning.

THE ACT OF SEPTEMBER 29, 1890—FORFEITURE ACT.

A reference to the forfeiture act shows conclusively that Congress considered that by that act these lands were forfeited. The first section of the act provides for the forfeiture of unearned grants, and says:

"*And the United States hereby resumes title thereto.*"

* * * * * *

"*And all such lands are declared to be part of the public domain.*"

In the fifth section provision is made for confirming title to "lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain north of the line known as the Harrison line, drawn from Wallula, Washington, easterly," etc. Also for

* * * * * *

"rights of way and riparian rights, heretofore attempted to be conveyed to the City of Portland, in the State of Oregon,

by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8th, 1886, (descriptive of lands) * * *forfeited by this act are hereby confirmed unto the said City of Portland.*

The lands above described as being confirmed to the City of Portland are with reference to the Northern Pacific grant situated similarly to the lands in controversy here.

If the contention of appellee is correct here, this legislation was entirely unnecessary. But Congress did not think so, because in the act these lands are described as "forfeited by this act." If a part of the lands from Wallula to Portland were forfeited it needs no argument to show that they were all forfeited.

That there might be no doubt as to the meaning of the act and plainly intending to provide against any misunderstanding of the effect of the act upon overlapping grants (such as arises in this case) the 6th section of the act says:

"Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit *of any state or corporations to which lands may have been granted by Congress* except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, *or to confer any right upon any state, corporation or person* lands which are excepted from such grant. Nor shall the moity of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines

has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line."

While the decisions of the Secretary of the Interior are not authority, yet as to questions involving title to public lands, they are entitled to and have always been accorded great respect by the courts.

In this connection, therefore, we call the Court's attention to the letter of Secretary Noble, Secretary of the Interior to the Commissioner of the General Land Office, dated February 17, 1892.

Every proposition made by appellee here was contented for in a protest then before the Secretary for consideration and made by the Oregon and California against the decision of the Commissioner of the General Land Office, holding these lands as forfeited by the act of September 29, 1890, and the Secretary overruled all the objections of contestants and held the lands as forfeited.

The case of The Oregon & California Railroad Company vs. the United States. (77 Fed. Rep., p. 67).

We are not unmindful of the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of the United States vs. The Oregon and California Railroad Company, now on appeal in this court.

But we submit that the decision of the majority of the court in that case is erroneous and should be reversed. Judge McKenna dissented, and as a part of this argument we submit

the following portion of his dissenting opinion. (77 Fed. Rep., p. 77-82.

"Many phases of railroad land grant cases have been presented to the Supreme Court, and have been so firmly established as to become postulates. These are: That grants of that kind are grants *in praesenti*, in the nature of a float. That they do not attach to specific sections until identification by a map of definite location of the road. That, within what has been called "common granted or primary limits," the date of the grant is the determinative fact in contending railway grants, not the date of location,—giving, if prior, priority of right; if at the same time, equality of right (that is giving the land in equal, undivided moities); in neither case can an advantage be secured by priority of location or of construction. That the condition of building the road is a condition subsequent, the right and grant continuing until forfeiture by or entry by the United States. And that the forfeiture or entry, in the absence of explicit legislative declaration, is for the benefit of the United States, not for the benefit of subsequent grantees. Applying these principles, and the principle that we have seen is likewise established, to-wit, that subsequent grants to railroads are not within the reservations of prior ones, how should the question in this case be answered? The last principle expressed removes, as irrelevant to contests between railway grants, maps of general route or of definite location. They only have purpose to the objects of the reservations, to-wit, settlers (homestead or pre-emption), not railroads. As to these (that is as to railroads), we can only have regard to the date of the grant and the rights conveyed. I cannot see (and I say it with deference) that the consequence, though it inevitably follows, that, if the lands in controversy be deemed appropriated by

the Northern Pacific act, all lands situated north of the forty-fifth degree of latitude must have been withdrawn, is very embarrassing To what is it embarrassing? To settlers, —to the occupation and development of the country under the land laws? Not at all. This is prevented by the reservations in the grant. To other railroad companies? Grants to these was not a constant, but an occasional policy, and dependent so much upon special circumstances as to require (certainly not necessarily to include) a right of selection of route in a wide territory. If this was to be primarily guarded against, or to be afterwards corrected, the remedy was in Congress and obvious. But it does not inevitably follow that all the land north of the forty-fifth degree of latitude was withdrawn. The grant had a limitation, and a practical one, too. The right was not to run the road anywhere north of the forty-fifth degree of latitude, but from a point on Lake Superior to a point on Puget Sound, by the most direct, eligible route. The Supreme Court said in U. S. vs. Northern Pacific Railroad Company, supra:

"Although that act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point, 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line at some suitable place, not more than three hundred miles from its western terminus, and extending 'via the valley of the Columbia river to a point at or near Portland.' If the main line, as originally indicated by the act of 1864, had been established on the route between

Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co vs. Northern Pac. R. Co., 139 U. .S. 1, 13, 11 Sup. Ct. 389, 393: 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.' "

I have said as to contesting railroad grants, we do not regard maps, either of general route, or of definite location, but only the date of the grants, and the rights conveyed by them. There are two,—one ultimate and the other provisional. The ultimate one gives a title to a certain number (20 in the territories, 10 in the states) of specific sections. The provisional gives a power of selection of these from a wider extent of territory. Is it not a substantial and necessary right? May it exist in fullness, and with power to exercise, in two railroad companies at the same time? Manifestly not. May it exist in them in succession, or, rather, suspended in one until default in the other? If so, when comes default, and how? In the answer to the first of these questions, it must, of course, be conceeded that congress has the power to grant a right in the public lands expectant or conditional upon the non-accruing of another, and probably the reasons

for its existence, or the embarrassments of a contrary view, have not been, and cannot be, put more strongly than the ability of counsel have put them in this case. But the same reasoning was urged in one of the first railroad land grant cases. Leavenworth, L. & G. R. Co. vs. U. S., 92 U. S. 733. It was urged in the last. U. S. vs. Southern Pac. R. Company, 146 United States, 570, 13 Supreme Court, 152. It formed the basis of the able dissenting opinions in both cases, but the majority of the Court has firmly resisted it—given always the same answer to it: That Congress, in any of its grants, cannot be supposed to have thereby intended to include land previously assigned for another purpose, that it did not intend to cause or invite vexatious conflicts, and that it only concerned the United States what became of land claims to which were abandoned or forfeited. In U. S. vs. Southern Pac. R. Co., supra, the lands in controversy lay within the granted limits of the Atlantic & Pacific and Southern Pacific Companies, at the crossing of their lines as definitely located. Congress passed an act forfeiting the grant to the Atlantic & Pacific Company, and it was claimed by the Southern Pacific Company under its grant. The Southern Pacific Company filed its map April 3, 1871,—more than a year before the Atlantic & Pacific Company filed its map; and it was hence contended that, if the title of the Southern Pacific Company was displaced, it was only conditionally displaced,— that is, displaced on condition that the Atlantic & Pacific Company should, by the final completion of its road, perfect its right thereto. The Court, however, resisted the contention, and held that whatever title or right the Southern Pacific Company might acquire by a prior filing of its map was absolutely displaced when the Atlantic & Pacific Company's map was

filed. "Illy as it may accord," said Mr. Justice Brewer, "with the common law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws, as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and therefore that, in the eye of the law, it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific." Some misunderstanding may arise from the use of the word "attached" in this citation. It is manifest, however, the expression was only used to meet the language of the contention. It is manifest that there was no displacement of title. There never was any in the Southern Pacific Company to be displaced. There was an act of Congress forfeiting the title of the Atlantic & Pacific Company, and the Court held that this did not inure to the benefit of the Southern Pacific Company. The case was a controversy over the title to specific tracts. Does its principle apply to a controversy over the right of selection of specific tracts? It is said that there is a passage in the opinion which forbids such application. It is as follows:

"Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this Court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked: Supposing the Atlantic & Pacific Company had never located its line west of the

Colorado river; would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all the land along its line, and, if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing that would interfere with the passage of the title to the Southern Pacific Company."

On a disputable proposition it is natural to look to any intimation of the Supreme Court, not only because of the supremacy of that tribunal, but because of the learning and abundant care which are bestowed upon its opinions. Yielding to this to the utmost, I cannot find anything authoritative in the passage. Such questions are often put, and as often answered as the Court answered that one,—or, rather, did not answer it, but only noticed,—conceding a possibility which it was not necessary to decisively affirm or deny. But the Court proceeded to say that the result supposed by the question was neither intended nor expected by Congress, and, if there had been no act of forfeiture, the Atlantic & Pacific could yet have constructed its road and secured the lands. "No power," said the Court, "but that of Congress, could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent." This language and reasoning are applicable to every right under the granting acts, whether we consider the intention of Congress, or its power to forfeit, and the effect of its exercise of the power, and it seems to me irresistibly so. By the express declaration of the act, the grants were made, and the rights and privileges were conferred upon and accepted by the Northern Pacific Railroad Company, on the condition that it should commence work

on the road within two years from the approval of the act by the President, and complete and equip the whole road by the 4th of July, 1876; and the further condition that if the company should make any breach of the conditions of the grants, and allow the same to continue for upwards of one year, then at any time thereafter the United States might do any and all acts and things needful and necessary to insure a speedy completion of the road. Sections 8 and 9. Subsequently a joint resolution was passed by Congress, extending the time for the commencement of the road to July 2, 1868, and for its completion to July 4, 1878. 14 Stat. 355, Sec. 2. On the 31st day of May, 1870, Congress passed the joint resolution already referred to, giving the company power to make "branch line," "main line," and the latter "branch line," but neither taking away nor giving other rights. The grant to the Oregon & California Railroad Company was made on the 25th of July, 1866. But the default in commencing the road within two years, or the default in building it, either under the original act or the resolution of 1870, was no concern of the Oregon & California Railroad Company. Nor did the forfeiture of September 29, 1890, inure to its benefit. In other words, it got no rights by either the default of the Northern Pacific, or the forfeiture by the United States. By what, then, did it get rights, and when? Only by its grant, if at all. But at the date of that the right of locating its road so as to take the lands in controversy existed unimpaired in the Northern Pacific Company, under the prior grant of 1864, and continued to exist, and did exist, unimpaired in that company January 29, 1870, when the Oregon & California Company filed its map of definite location; did exist when that company built its road; did exist in 1871 and 1877, when patents were issued to that company. If not, by what

was it taken away?. Certainly not by any act of the United States, and the United States alone had the power. No act of the Oregon & California Company could do it. The default of the Northern Pacific Company, if there was any, was no concern of the Oregon & California Company. This company had no rights, except, as I have already said, those its grant gave it. It could get none from filing a map of definite location, or none by building its road, or impair none that the Northern Pacific company received by its grant. This seems very plain, but may not the reasoning be still further extended? Whatever rights passed to the Northern Pacific Company by the act of 1864 could only be lost by abandonment, or by resumption by the United States on account of non-performance of conditions. Abandonment is not claimed, and if it were, abandonment of rights, as forfeiture of rights, has always been held not to contribute to railroad grants. Were the rights of the Northern Pacific Company taken away by forfeiture? The majority of the court say no. My Brother Ross' language is:

"That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear; for the forfeiture was for the benefit of the government only. U. S. vs. Southern Pac. R. Co., 146 U. S. 570, 13 Sup. Ct. 152."

But, if not by that forfeiture, not at all; and the rights (and all of them) of the Northern Pacific Company still exist, and may yet be exercised. Is not this an irresistible conclusion from the cases? Do not all rights of the Northern Pacific Company, in complete fullness, exist until they shall be exercised or forfeited? Does not the right to built its road exist, and all rights necessary for that greater right also exist? Are

they not inseparable? Is not one the complement of the other? And, if so, does not the language of Justice Brewer in U. S. vs. Southern Pac. R. Co., supra, accurately apply? I think so. He said:

"Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic& Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific. It was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant, and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit."

It follows from these views that the decision of the Circuit Court was correct."

Respectfully submitted.

JOHN M. GEARIN,
Solicitor and Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN D. WILCOX, Appellant,
vs.
THE EASTERN OREGON LAND COMPANY, Appellee.
No. 454.

E. I. MESSINGER, Appellant,
vs.
THE EASTERN OREGON LAND COMPANY, Appellee.
No. 455.

Brief and Argument on Behalf of Appellee, submitted by Counsel under Rule 20, Supreme Court Rules.

These suits were brought to obtain decrees cancelling United States patents issued to the defendants, purporting to convey to them certain lands described in the complaint. The lands in controversy are within the limits of the grant of lands in place made to the State of Oregon by the act of Congress approved February 25,

1867, to aid in the construction of a military wagon road. They are claimed by the defendant to be within the overlapping limits of the grant to the Northern Pacific Railroad Company.

The cases were heard in the court below on bill and answer. The bills and answers are alike in both cases, except as to the names of the defendants, the description of the lands claimed by them, and the law of the United States under which they claim to have acquired title to the same. In the case of the company against Messinger, the land in controversy is situated within twenty miles of the line of the Northern Pacific Railroad Company's road, as designated on the map of the general route of said road, filed by said company August 13, 1870; and in the case of the company against Wilcox, the land is situated more than twenty miles, and less than forty miles, from said line.

Precisely the same questions are involved in both suits, except that if the court should be of the opinion that any lands were excepted from the said grant to the State of Oregon by reason of being within the grant of the Northern Pacific Railroad Company the court will be called upon to decide, in the case of the company against Wilcox, the question whether the Northern Pacific Railroad Company took by its grant twenty sections to the mile or ten sections to the mile only, in the State of Oregon, between Wallula and Portland.

STATEMENT OF FACTS.

The facts alleged in each bill, and admitted by the answer in each suit, may be summarized as follows:

The Bill.

That the complainant is a corporation under the laws of the State of California, and a citizen of that State, and that the defendant is a citizen of the State of Oregon.

That on the 25th day of February, 1867, the Congress of the United States passed, and the President of the United States duly approved, an act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia River, to a point on Snake River opposite Fort Boise, in Idaho Territory, the alternate sections of public land, designated by odd sections, to the extent of three miles in width on each side of said road, to be exclusively applied to the construction of said road, excepting and reserving from said grant and the operation of said act only lands theretofore reserved or appropriated.

That said act provided that the lands thereby granted should be disposed of by the Legislative Assembly of the State of Oregon for the purpose aforesaid, and no other; that said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges for the transportation of any troops, property, or mails of the United States; and that the lands thereby granted should be disposed of only in the following manner, that is to say: When the Gov-

ernor of the State should certify to the Secretary of the Interior that ten coterminous miles of said road were completed, then a quantity of the land granted by the act, not exceeding thirty sections, might be sold, and so on, from time to time, until said road should be completed.

That by the act of the Legislative Assembly of the State of Oregon approved October 20, 1868, entitled "An act dedicating certain lands to the Dalles Military Road Company," the State of Oregon granted to the said Dalles Military Road Company, a corporation duly incorporated for the purpose of constructing said road, all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon by the said act of Congress, for the purpose of aiding said Dalles Military Road Company in constructing the road, as mentioned and described in said act of Congress, and upon the conditions and immunities therein prescribed.

That prior to the 23d day of June, 1869, the said Dalles Military Road Company surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of Congress, and in the said act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road, and had filed in the executive office of the Governor of the State of Oregon a plat or map of the said Dalles Military Road Company, upon which was traced and shown the definite location of said road, as constructed from its terminus at Dalles City, Oregon, to its terminus on Snake River, and the limits of the grant of lands in place made to the State of Oregon by

the said act of Congress, to aid in the construction of said road, and also the indemnity limits of the said grant.

That on June 23, 1869, the Governor of Oregon certified that the plat or map of said Dalles Military Road had been duly filed in the executive office, and that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress aforesaid, approved February 25, 1867, and with the said act of the Legislative Assembly of the State of Oregon, approved October 20, 1868; and the said Governor of Oregon at that date further certified that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by the conditions of said act, and was then accepted, said certificate being set forth at length in the bill of complaint.

That upon the filing of said plat or map in the executive office of the Governor of the State of Oregon, showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the Governor of Oregon, certifying to the completion of said road, the grant made by the said act of Congress of February 25, 1867, to the State of Oregon, to aid in the construction of said road, became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road, as located and constructed.

That the said Dalles Military Road Company duly filed in the office of the Secretary of the Interior of the

United States a map or plat of said Dalles Military Road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the said Governor of the State of Oregon, certifying to the construction of said road, that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States, and was accepted and received and filed in said Department; and that on December 18, 1869, the then Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections three miles upon each side of said wagon road, as delineated and shown on said map, in favor of the Dalles Military Road Company.

That the Congress of the United States, by an act approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon, to aid in the construction of wagon roads, and the certificate of the Governor of Oregon should show that any said road had been constructed or completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands unless the State should by public act have transferred its interest in said lands to any corporation, in which case the said lands were to be patented to such corporation.

That Edward Martin, a citizen of the State of California, placing confidence in the said certificate of the Governor of the State of Oregon, and in said acts of Congress, and the withdrawal of said lands by the Commissioner of the General Land Office, on the 31st day of May, 1876,

purchased in good faith, for the sum of $125,000, then paid by him to the Dalles Military Road Company, all the lands embraced in said grant, except the portions which had been previously sold, and at the time of said purchase and at the time of paying said consideration had no notice or knowledge, actual or constructive, of any claim of the Northern Pacific Railroad Company, or any claim made by any corporation or person, or by the Government of the United States, that any portion of the lands granted to the State of Oregon, as aforesaid, were excepted, or claimed to be excepted, from said grant on account of any previous grant to the Northern Pacific Railroad Company, or otherwise.

That on the 31st day of January, 1877, said Edward Martin conveyed an undivided one-fourth interest in said lands to D. V. B. Henarie, he, the said Henarie, having paid one-fourth of the consideration of said conveyance from the Dalles Military Road Company to Edward Martin, and having made the purchase and paid the consideration in good faith, and relying upon the said acts of Congress, and certificate of the Governor of the State of Oregon, and the withdrawals of said lands, and that he had no notice or knowledge, actual or constructive, that any portion of the said grant was claimed to be excepted for the reasons aforesaid.

That on the 12th day of May, 1880, said Edward Martin died intestate in the city of San Francisco, leaving certain heirs, who are named in the bill.

That among said heirs were James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, who were then minors.

That afterwards the interests of the minors in said

grant were sold by order of the Probate Court of Wasco County, Oregon, and were purchased at guardian's sale by Peter Donahue and James Phelan, who paid a valuable consideration therefor, and who purchased the same and paid said consideration with no knowledge or notice, actual or constructive, that any portion of the lands within the limits of said grant was claimed by the Northern Pacific Railroad Company, or any other corporation or person, or by the Government of the United States, adversely to the said Dalles Military Road Company.

That afterwards the heirs of said Edward Martin and the said Peter Donahue and James Phelan conveyed the said grant to the Eastern Oregon Land Company, the complainant in the present suits.

That the said Dalles Military Road Company duly selected, among other lands which had been earned by it by the construction of its said wagon road, the lands in controversy, and that the same were a part of the grant of lands in place to the State of Oregon by the said act of February 25, 1867, and were a portion of the lands withdrawn in favor of the said Dalles Military Road Company on the 18th day of December, 1869, and were situated on the south side of the line of the general route of the Northern Pacific Railroad Company, as designated on the said map filed August 13, 1870, and were then unoccupied lands, there being no claim to the same adverse to the company, and that the list containing said selection was duly certified by the Register and Receiver of the Land Office at Dalles City to the Commissioner of the General Land Office.

That by an act approved July 2, 1864, Congress granted

to the Northern Pacific Railroad Company, to aid in the construction of a railroad from Lake Superior to Puget Sound, with a branch, via the Columbia River, to Portland, by the most eligible route, every alternate odd section of public land, not mineral, to the amount of twenty alternate sections to the mile on each side of said road through the Territories of the United States, and ten alternate sections a mile on each side of said road whenever it passed through a State, and whenever on the line thereof the United States had full title not reserved, sold, *granted*, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road should be *definitely fixed* and the plat thereof filed in the office of the Commissioner of the General Land Office.

That by a Joint Resolution of Congress of May, 31, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Company to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main line across the Cascade Mountains to Puget Sound.

That on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Company filed a map or plat of the *general route* of its road, and filed the same in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing, among other things, the general route

of said road, following the Columbia River from Wallula, in the then territory of Washington, to a point on the north side of said river opposite Portland, in the State of Oregon.

That the Secretary of the Interior accepted said map and directed the Commissioner of the General Land Office to withdraw, on account of the grant to the said Northern Pacific Railroad Company, from sale, pre-emption, homestead, or other disposal, the odd-numbered sections not sold or reserved, or to which prior rights had not attached, within twenty miles on each side of the route of the said Northern Pacific Railroad.

That the line of the road of said Northern Pacific Railroad Company, between Wallula and Portland, to a point opposite Portland, was never surveyed; that the line of said road between said points was never *definitely located* or fixed by the said company; that no map of definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City or in the Interior Department; that the said Northern Pacific Railroad Company never constructed any portion of its said road between the said town of Wallula and the said city of Portland.

That upon the filing the said map of the general route of its road by the said Northern Pacific Railroad Company, on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd-numbered sections lying within the supposed limits of the grant of lands in place to the Northern Pacific Railroad Company, as aforesaid.

That Congress, by an act forfeiting lands theretofore

granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29, 1890, resumed title to and restored to the public domain, so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroads not then completed and in operation, for the construction or benefit of which said lands were granted.

That after the passage of said act, the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line of the general route of the said Northern Pacific Railroad, between Wallula and a point on the north side of the Columbia River, opposite the city of Portland, in the State of Oregon, as said line was designated on said map of general route of the road of said company, filed August 13, 1870, had been granted to the Northern Pacific Railroad Company, and were reserved and excepted from the said grant made to the State of Oregon by the said act of February 25, 1867, and had reverted to and became public lands of the United States, open to settlement and sale under the land laws of the United States, and that the said Secretary caused the said lands to be open to settlement and sale, and thereupon the defendant settled upon the said tract of land, and afterwards made application to purchase the same, and that afterwards the President of the United States issued a patent to him for said lands, a copy of which patent is attached to the bill.

That the Secretary of the Interior of the United States

had no jurisdiction or authority to open the said lands to settlement and permit the defendant to settle thereon, and the President of the United States had no jurisdiction or authority to issue a patent therefor.

That at and before the time the defendant settled upon said tract of land, or made claim thereto, or made application to purchase the same, the defendant well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Company, and that the same were claimed by the said Dalles Military Road Company, and its successors and assigns, under said grant.

That if it had been true that the lands in question were excepted from said grant to the State of Oregon, as claimed by the defendant, under the provisions of section 5 of the act of Congress entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, the complainant would have been entitled to purchase said lands from the United States, being a *bona-fide* purchaser thereof, without notice of any claim of the said Northern Pacific Railroad Company to the said lands, but that complainant received no notice and had no notice or knowledge of the application of the defendant to purchase said land, and had no opportunity to apply to purchase the same under the provisions of said section 5, or otherwise.

That a patent having been issued for said land, the Interior Department has no longer jurisdiction of the same, and can not give complainant the most convenient

and conclusive evidence of its title to the said lands, and can not issue to complainant patent for the same, as required by the said act of June 18, 1874, until the patent to the defendant has been cancelled, annulled, and set aside, and that said patent is a cloud upon the title of complainant to said land described therein, and complainant is remediless in a court of law.

The Answer.

By the answer, as we have said, all the material allegations of the bill are, as we conceive, admitted.

The defendant, answering the allegations of the bill that Edward Martin, the purchaser of the grant from the Dalles Military Road Company, and his grantees and the complainant, were *bona fide* purchasers, and had no actual or constructive notice or knowledge that any portion of the lands embraced within the grant to the State of Oregon, to aid in the construction of said wagon road, were excepted therefrom on account of any previous grant to the Northern Pacific; denies that the parties had no *constructive notice*, but alleges *in relation thereto* that at the time they made said purchase and received their deeds "they were all chargeable with constructive notice of the several acts of Congress in relation to said lands, and the effect thereof, and that under said acts of Congress and the acts and doings of the said railroad company, no title could pass to the said Dalles Military Road Company for the lands in question."

Denies that the grant of lands made to the Northern Pacific Railroad Company, between Wallula and Port-

land, to aid in the construction of a road between said points, never was located or fixed, and that the said railroad company never acquired any right or title or interest to the same.

Denies that the Commissioner of the General Land Office and the Secretary of the Interior wrongfully claim that said lands were excepted from said grant to the State of Oregon on account of being included in the grant to the Northern Pacific Railroad Company.

By the answer, also, the defendant alleges that on March 16, 1865, the then Secretary of the Interior received from Josiah Perham, the then President of the Northern Pacific Railroad Company, a certain letter of that date, a copy of which is attached to the answer, and that accompanying said letter was a map referred to therein, a copy of which is made part of the answer, and that on the 9th of March, 1865, the Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with a letter, a copy of which is attached to the answer, and that on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior, with a letter, a copy of which is attached to the answer.

These letters show that the map was not received by the Secretary of the Interior or filed, that it was not in accordance with the requirements of the laws of the United States and the regulations of the Department, and was rejected.

This map is known as the Perham map, and has been frequently the subject of consideration by the Federal courts, as we will hereafter show.

Basis of Complainant's Claim.

The complainant (appellee) bases his right to recover in this suit upon the following act of Congress approved February 25, 1867:

Chapter LXXVII.

"An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River.

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Cañon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose, and shall be disposed of only as the work progresses: *And provided, further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress, or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided, further*, That the grant hereby made shall not embrace any mineral lands of the United States.

"SEC. 2. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by the

legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

"SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

"SEC. 4. *And be it further enacted*, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act.

"SEC. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States.

"SEC. 6. *And be it further enacted*, That the United States surveyor-general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect."

"Approved February 25, 1867." (14 Stats., 409.)

On October 20, 1868, the State of Oregon granted lands specified in the act of Congress of February 27, 1867, to The Dalles Military Road Company by the following act:

"An act donating certain lands to Dalles Military Road Company.

"Whereas at the second session of the Thirty-ninth Congress that body passed an act entitled 'An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River,' approved February 25, 1867, as follows:

(Here appears the act of Congress referred to.)

"*Be it enacted by the Legislative Assembly of the State of Oregon:*

"SECTION 1. That there is hereby granted to Dalles Military Road Company, incorporated, as it appears by the articles of incorporation filed in the office of the Secretary of State on the 30th day of March, 1868, all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

"SEC. 2. There is hereby granted and pledged to said Dalles Military Road Company all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road.

"SEC. 3. The said Dalles Military Road Company is hereby authorized to locate the lands mentioned in the fourth section of the above-recited act, subject to the approval of the governor.

"Approved October 20, 1868."

(Session Laws of 1868, p. 3.)

Argument and Brief.

First.

The lands in controversy were not excepted from the grant to the State of Oregon by reason of the Northern Pacific Railroad Company having filed its map of general route on August 13, 1870; nor by filing the Perham map.

It will be remembered that the grant to the State of Oregon was made on February 25, 1867; that the wagon road in aid of which the grant was made was constructed and completed prior to the 23d day of June, 1869; that the Governor of Oregon had, on July 23, 1869, certified that the road had been definitely located and constructed and completed; that the map of the constructed road and the Governor's certificate of its completion had been filed in the Interior Department prior to December 18, 1869; and the lands embraced within the limits of the grant to the State of Oregon had been withdrawn from settlement and sale on that date.

We contend that the title of the State of Oregon and of its grantees was not affected by the filing of the map of general route on August 13, 1870.

First. Because, being a map of general route only, it had no retroactive effect; and

Second. Because it did not identify the Northern Pacific Railroad Company's grant so that the grant attached to any particular tract of land.

It has been repeatedly held that the effect of filing a map of general route is only to withdraw the lands from *future* disposition. It does not cause the grant to attach to any particular tract of land. The grant still remains a floating grant until a map of definite location is filed. It may be admitted that if the Northern Pacific Railroad Company had definitely located its road from Wallula to Portland, its grant as to lands within the limits of its grant in place *not excepted from the grant* would have taken effect and its title would have related back to the date of the grant, and the grant would have attached to specific tracts of land.

But in the present case it is alleged in the complaint, and not denied by the answer, that "the line of the road of said Northern Pacific Railroad Company between Wallula and Portland, or to a point opposite Portland, was never surveyed; that the line of said road between the said points was never definitely located or fixed by the said company; that no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department; that said Northern Pacific Railroad Company never constructed any portion of its said road between said town of Wallula and said city of Portland."

So that there is no question in these cases about the character of the map filed on the 13th day of August, 1870; and we claim that the right of the wagon road

company to the lands in question was not impaired, nor the status of the lands affected, by that map; that the question, therefore, to be considered in these cases is not what lands the Northern Pacific Railroad Company would have acquired, if it had definitely located and constructed its road between Wallula and Portland, but what rights it acquired, if any, by filing a map of general route, and whether the filing of said map segregated any lands from the public domain or prevented them from passing to the Dalles Military Road Company, under the grant to the State of Oregon.

We think this question has been substantially decided by the Supreme Court of the United States in several cases. In Kan. Pac. Ry. Co. *v.* Dunmeier (113 U. S., 636), Mr. Justice Miller, in delivering the opinion of the Supreme Court, said:

"The record shows that while the company did not file its line of definite location until about two months after Miller had made his homestead entry, it did designate the general route of said road and file a map thereof in the General Land Office, on July 11 of the same year, 1866, which was fifteen days before the homestead entry."

Again, he said, speaking of the rights acquired by the railroad company by filing a map of general route of its road:

"What were those rights? This action does not, like the filing of the line of definite location, vest in the company a right to *any specific piece of land.* It establishes no claim to any particular section with an odd number."

And in United States *v.* Southern Pacific Ry. Co. (13

Sup. Ct. Rep., 157; 146 U. S., 600–1), Mr. Justice Brewer, in announcing the opinion of the Supreme Court, said:

"A distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of Butts *v.* R. R. Co. (119 U. S., 55; 7 Sup. Ct. Rep., 100.) The act under consideration in that case was that of July 2, 1864 (13 Stat., 365), making a grant to the Northern Pacific Railroad Company."

And, again, he said:

"The act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the distinct location of its road, and limits the grant to such alternate sections as have not been reserved, sold, granted or otherwise appropriated, and are free from pre-emption grant or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of adjoining odd sections within forty miles on each side until the definite location is made."

And he further says:

"The map which was filed on April 3, 1871, was simply one of *general route*, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached."

In the case of Kan. Pac. R. R. Co. *v.* Atlantic R. R. Co. (112 U. S., 422), the court said:

"The line of the road * * * was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant * * * was in

no respect an impairment of its rights. * * * The order of the withdrawal of lands along 'the probable line' of the defendant's road, made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which it would have acquired to the lands, nor in any respect controlled the subsequent grant."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court in the case of St. Paul, etc., Co. *v.* Greenhalgh (26 Fed., 565), said:

"The complainant took nothing by the withdrawal. A withdrawal passes no title. It only prevents other titles from accruing."

In the case of the Wis. Cent. R. R. Co. *v.* Price (133 U. S., 496–519), the court, in discussing the effect of the filing of a map of general route, at page 509, said:

"The title conferred by the grant was necessarily an imperfect one. Because until the lands were identified *by the definite location* of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, *afloat.*"

And Mr. Justice Brewer, in the case of Sioux City, etc., R. R. Co. *v.* Griffey (143 U. S., 32–41), on pages 38, 39, said:

"The first and principal question is, at what time the title of the company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. * * * The fact that the company has surveyed and staked a line upon the ground does not conclude it.

It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each, and only when, by filing its map, it has communicated to the Government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the grant are concerned, is its line *definitely fixed;* and it can not, therefore, without the consent of the Government, change that line so as to affect titles accruing thereunder."

In the case of the United States *v.* The Southern Pacific Ry. Co. (13 Sup. Ct. Rep., 152; 146 U. S., 570), which was a suit concerning lands between the overlapping limits of the grant to the Atlantic & Pacific Railroad Company, and a grant to the Southern Pacific Railway Company, in which the grant to the Atlantic & Pacific was the prior grant, but the definite location of its road was subsequent to the definite location of the road of the Southern Pacific, and in which grant to the Southern Pacific there had been inserted the following proviso: "*Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company," it was held that the grant to the Atlantic & Pacific being a prior grant, and the line of its road having been definitely located, its title related back to the date of the grant, and it took the lands within the conflicting limits of the two grants, in preference to the Southern Pacific Company. Mr. Justice Brewer, in announcing the decision of the Supreme Court, said:

"The question is asked, supposing the Atlantic &

Pacific Company had never located its lines west of the Colorado River, would not these lines have passed to the Southern Pacific Company under its grant? *Very likely that may be so.* The language of the Southern Pacific Company's grant is broad enough to include all lands along its line; but if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company."

As the definite location of the line of the road of the Northern Pacific Railroad Company, from Wallula to Portland, was never made, the grant to the Northern Pacific never took effect as to any land alleged to have been granted in aid of the line from Wallula to Portland, and it can not be affirmed or established as a matter of law or fact that a single section of land was granted to the Northern Pacific for that portion of its road, or at least any particular section, and therefore it can not be shown that any portion of the lands embraced within the grant to the State of Oregon were ever granted to or reserved for the Northern Pacific Railroad Company.

The Perham Map.

Were the lands in question withdrawn by operation of law upon the transmission to the Secretary of the Interior of the Perham map in 1865, so as to except them from the operation of the grant to the State of Oregon made by the act of February 25, 1867?

That the Perham map was not executed in accordance with the requirements of the statute and the regulations

of the Department, and was not accepted or filed by the Department of the Interior, and that no withdrawal of lands on account thereof was made, appears from the correspondence concerning the same, made exhibits to the answer. The Perham map purported to be a map of the main line of the road of the Northern Pacific Railroad Company from Lake Superior to Puget Sound. The act of July 2, 1864, required the main line of said road to be located and constructed upon the most eligible route between those points. As was said by Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United States in United States *v.* Northern Pacific R. R. Co. (14 Sup. Ct. Rep., 598; 152 U. S., 284):

"The road should be constructed upon the most practicable line. Any unnecessary deviation from such line would not be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant."

The decision of the Supreme Court in this case seems conclusive that the Perham map was properly rejected by the Department. In delivering the opinion of the court, Mr. Justice Harlan said:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound; and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than 300 miles

from its western terminus, and extending 'via the valley of the Columbia River to a point at or near Portland. If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than 300 miles from its western terminus, and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co. *v.* Northern Pac. R. Co. (130 U. S., 1, 13; 11 Sup. Ct., 389), 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and it would be rejected as not in accordance with the grant.' It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget Sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia River and via some point at or near Portland. It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia River, that

would strike the main trunk line connecting Puget Sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget Sound."

In the case at bar it does not appear that the line traced on the Perham map was the most eligible route for the main line of the company's road between Lake Superior and Puget Sound.

The question of the validity and effect of the Perham map is thoroughly and ably discussed in the brief of counsel for appellants in the case of the United States *v.* The Oregon and California R. R. Co., John A. Hurlburt and Thomas L. Evans, lately decided by the Circuit Court of Appeals, and we take the liberty of incorporating the following portion of their argument applicable to this case in this brief:

"We claim that the lands in suit were in nowise affected by the Perham map, for all of the following reasons:

"(*a*) It showed two different lines of a road to Puget Sound—but did not designate either, even alternately, for a route.

"(*b*) It did not pretend to designate a route which the company had 'determined' upon or 'fixed.'

"(*c*) It was not accepted by the United States.

"(*d*) The Commissioner's rejection is conclusive as to the Northern Pacific Company, because it acquiesced and did not appeal. The United States, having sustained no wrong thereby, could not have complained of

its own action at the time, in a direct proceeding—and should not, at this late day, be heard to complain collaterally.

"(*e*) The Northern Pacific Act did not provide for, nor contemplate, the withdrawal of any land from liability to subsequent *grant*, made before definite location.

"(*a*) The first section of the act of 1864 authorized the Northern Pacific Company to construct its *main road* 'by the most eligible railroad route' north of the forty-fifth degree of latitude, from Lake Superior to Puget Sound, and also to construct a branch road down the valley of the Columbia River to a point near Portland.

"The Perham map shows several different lines, without even expressing a preference between them. Two routes, starting at different points on Lake Superior, are brought together in Montana, at a point marked 'A' on the map. One of those lines is marked 'a practicable railroad as surveyed by Governor Stevens,' and the other as 'worthy an examination for a railroad route.'

"From 'K,' in Washington, a line extends northwest to 'H,' on Puget Sound—and another line is drawn from 'K' southwesterly along the course of the Columbia River to Vancouver, thence north to the point 'H,' on Puget Sound.

"The Northern Pacific Company did not by this, nor by any map filed prior to the Joint Resolution of 1870, offer to designate a route for the *branch-line road.* It wanted to build a road which would connect Portland, Puget Sound, and Lake Superior; but had no authority to extend its branch line beyond Portland, and the act of 1864 terminated the main line at Puget Sound. Had the company been assured that, by waiving the branch-line provisions, the main-line road could be built down the Columbia River to Portland, thence to Puget Sound,

it may be that it would have adopted the Columbia River line; but it is apparent that the company could not make a map committing itself to the adoption of a fixed line for either the branch or main road, as such, without thereby illustrating that it had no authority to build a road from Portland to Puget Sound. The act fixed the terminus of the main road at Puget Sound, and the terminus of the branch at a point near Portland, and when either road reached the prescribed terminus it must stop there; and the theory out of which the Perham map evidently arose, was that the company might, by waiving its *branch-line* authority, build its *main line* to Puget Sound by way of Portland.

'It was for these reasons, we believe, that the Perham map made equivocal and alternative designations of route.

"It is contended * * * that the Perham map made a valid designation from 'K' to Vancouver of the *branch-line* road, nothwithstanding it was made and filed as a general route map of the *main-line* road to Puget Sound by way of Vancover; because the same company, at that time, had the right to make and file a general route map, designating for its branch road the identical route from 'K' to Vancouver, shown on this map. The vice of such contention, it seems to us, arises out of contemplating the privileges and rights conferred as a unit of grant—because the beneficiary thereof is the same corporation.

"Suppose the act had authorized the Northern Pacific Company to construct a road by the most eligible route, from Lake Superior to Puget Sound; and another company to construct a branch road from 'K' to Portland. It certainly could not be claimed that such other company would be bound by, or entitled to any benefits from, the Northern Pacific's designation of a line of route from 'K' to Puget Sound by way of Portland; nor that the

Northern Pacific could designate such a route at all. While the fact that in one instance the Northern Pacific Company was, and in the other was not, the beneficiary of the two grants, would make a difference in considering the quantity of grant made to that company, it should not make any difference in considering the grants themselves, as such.

"Nothing is claimed here by or for the Northern Pacific Company. The question here is as to whether the filing of the Perham map, showing a line for the *main road* along an unauthorized route, constituted a designation of the *branch-line* road, in so far as the branch-line road *might have been*, but was not, mapped for such route.

"(*b*) The first section of the act of 1864 authorized the construction of a railroad along a line 'to be *determined* by said company.' Section 3 describes the lands granted in relation to such railroad line 'as said company may *adopt;*' and section 6 provides what shall be done 'after the general route be *fixed.*'

"In the case of Hayes *v.* Parker *et al.* (2 L. D., p 555), considering the provisions of these sections, Secretary Teller said:

> "'The act in question provides for but one line of general route, and one of definite location. It is certainly a very grave question whether legislative withdrawal operates under any preliminary map other than the one which the company *finally determines* shall be the settled and *fixed* general route of the road. If legislative withdrawals operate upon preliminary lines not finally fixed as lines of general route, then we have in this instance a legislative withdrawal of a section of country almost entirely different from that which was finally included in the lines of the general route.'

"It will be remembered that the Perham map was rejected, and no executive withdrawal of any land was

made in pursuance of it. But had it been accepted by the Land Department, who might say what lands it operated to withdraw—those along the direct line from 'K' to 'H,' or those along the line which followed the Columbia River to Vancouver, thence to 'H'? As a matter of fact, the road was not built along either of those lines.

"(c) No executive withdrawal was made in pursuance of the Perham map, and we claim that the Perham map did not operate a legislative withdrawal, because, among other reasons, it was not *accepted* by officers of the United States.

"We know of no case the decision of which depended solely upon the Land Officers' acceptance or rejection of a railroad map. It seems to have been treated as a *matter of course*, throughout the decisions relating to the public lands, that there can be no pre-emption, homestead, or other claim under the laws relating to the public lands, without the co-operation of the Land Department; and, in the same way, it has been frequently said, in effect, that acceptance of the Land Officers is essential to the efficacy of railroad maps.

"The grant made by the act of July 23, 1866, to the St. Joseph & Denver City Railroad Company contained no specific requirement that the company file a map of definite location. The language of the act is:

> "'That there be hereby granted * * * every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of said road is definitely fixed, sold,' etc.

"Construing this grant, Mr. Justice Field said:

> "'Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a

> route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and *accepted* by that officer, the route is established; it is, in the language of the act, "definitely fixed," and can not be the subject of future change, so as to affect the grant, except upon legislative consent.' (Van Wyck *v.* Knevals, 160 U. S., 366.)

"Secretary Smith, in the case of Cole *v.* N. P. R. R. Co. (17 L. D., 9), construing section 6 of the Northern Pacific Act, held:

> "'Said section provided for a legislative withdrawal of lands within the granted limits, upon the filing of a map of general route, which became operative upon the *approval* of the map.'

"Substantially the same language is used by Assistant Attorney General Smith, in his opinion to Secretary Delano, reported at page 377, Copp's Pub. Land Laws (1875 ed.), in which Secretary Delano concurred (p. 380).

"In the case of Buttz *v.* N. P. R. R. Co. (119 U. S., at page 71), Mr. Justice Field said:

> "'The act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the definite location of the line of its road; * * * but it also contemplates a preliminary designation of the general route of the road. * * * The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line.'

"(*d*) Section 2273 of the United States Revised Statutes provides that—

> "'Appeals from the decision of the district officers, in cases of contest for the right of pre-emption, shall

be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.'

"This section was taken from the act of June 12, 1858, and was very soon after adopted as a rule of practice in respect of all decisions rendered by the Commissioner. Rule 112 of the 'Rules of Practice' provides that:

> "'Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.' (IV L. D., 49.)

"No appeal was taken for the Northern Pacific Company from the Commissioner's rejection of the Perham map.

* * * * * * *

"In the case of United States *v.* Marshall Mining Co., (129 U. S., at page 587), Mr. Justice Miller, in delivering the opinion, said:

> "'They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.
>
> "'It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the *right to appeal* to the Commissioner of the General Land Office from the order of the register and receiver dismissing their application. This was not done, and it never has been done.
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> * * * * * * *
>
> "'All the errors and irregularities which occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the Land Department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party can not

be permitted to remain silent for more than eight years after he has abandoned a contest, submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the Land Office.'

"It may be safely said that the Northern Pacific Company could not now maintain a suit, in a court of equity, which depended upon its establishing the validity of the Perham map; and yet, as between the United States and that company, the company, and not the United States, was injured—if any wrong was done by the Commissioner's rejection of the Perham map.

"The Northern Pacific Company asked approval of the Perham map, and that lands of the United States along the lines shown on it be withdrawn. The United States, by the Commissioner, acting without fraud, rejected the map and refused the withdrawal. If any wrong was done it was *by* the United States, and *against* the company. The company might have complained, but did not; but the courts were at all times closed against the United States, for it had *no wrong to redress.*

* * * * * * *

"(*e*) Nearly all of the railroad land grants provide that there shall be a withdrawal of lands, when a map of general route is filed; but the Northern Pacific Act does not. The words of section 6, 'and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption,' relied upon as operating a withdrawal, are words of *exclusion* from sale, entry, and pre-emption; and are not equivalent to a statutory *withdrawal* from market.

"In the case of Kan. Pac. Co. *v.* Dunmeyer (113 U. S., 629–644), the decision depended upon whether the land

in suit was withdrawn from *homestead entry* by a railroad grant, which provided a withdrawal of lands, upon general route designation, from 'sale' only. It was held (at page 638):

> "'This act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from "*sale*" by order of the Secretary of the Interior. The lands, therefore, were to be reserved from *sale only*, and not from pre-emption or homestead claims.'

"An analysis of the act of 1864, considered in view of the Joint Resolution of 1870, makes it evident, beyond the plain meaning of the words employed, that Congress did not intend that any lands should be reserved from such subsequent *grant* as it might see fit to make, prior to definite location of the Northern Pacific grant.

* * * * * * *

"All lands 'granted' prior to definite location are excepted—and it is provided that the company shall have other lands in lieu of those 'granted.' Section 6 provides that the lands shall not be subject to 'sale, or entry, or pre-emption'; but does not exclude them from subsequent *grant*.

* * * * * * *

"Notwithstanding the lands were withdrawn upon general route designation from pre-emption, entry, and sale, persons who settled upon such lands prior to the withdrawal might thereafter pre-empt, enter, and purchase the same—but the withdrawal reserved the land from liability to pre-emption, entry, or sale, founded upon settlement initiated after withdrawal. And so it was the act provided that the company should have other lands for such as were pre-empted, entered, or sold prior to definite location. But the act also provided that the company should take other lands for such as were 'granted' or 'reserved' prior to definite location.

"If, upon general route designation, the lands were withdrawn from the power of Congress to grant them to, or reserve them for, another company, then what did the act mean by saying that the company shall take other lands for those *granted* or *reserved* prior to definite location?"

Opinion of the Circuit Court of Appeals in the case of the Oregon and California Railroad Company vs. United States. (77 Fed. Rep., 67.)

These cases against Wilcox and Messinger were heard together in the Circuit Court of Appeals for the Ninth Circuit, but no opinion was delivered by the court except this:

HAWLEY, District Judge:

"Both of these cases present the identical questions that were involved in the case of the Oregon and California Railroad Company *v.* United States (77 Fed., 67), and are necessarily controlled by the decision in that case. We adhere to the views therein expressed, and upon the authority of that case the judgments and decrees in these cases are reversed, with instructions to the Circuit Court to enter a decree in favor of complainant in each case."

For the information of the court, and as part of our argument, we here present the opinion of the court in that case:

Before MCKENNA and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge:

"The case is this: By the act of Congress of July 2, 1864 (13 Stat., 365), the Northern Pacific Railroad Com-

pany was incorporated, with authority to construct and maintain a continuous railroad and telegraph line—

> " 'Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.'

"And granting to the company, in aid thereof, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile on each side of its line, as the company should adopt through the Territories of the United States, and ten alternate sections per mile where the road passes through any State—

> " 'And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.'

" The sixth section of the act provided that:

> " 'The President of the United States shall cause the lands to be surveyed for forty miles in width on

both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act.'

"On the 6th day of March, 1865, Josiah Perham, as president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior the following letter:

"'WASHINGTON, D. C., *March 6, 1865.*

"'Hon. J. P. UPSHER,

"'*Secretary of the Interior:*

"'SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys; and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

"'I am, respectfully, your obt. servt.,

"'JOSIAH PERHAM,

"'*Prest. N. P. R. R. Company.*'

"Accompanying this letter was a map, upon which was traced, in red ink, a line indicated by the letters 'H, J, K, L, M, A, B, C,' and extending from Lake Superior to Puget Sound, and along which was written this explanatory statement: 'H, J, K, L, M, A, B, C, is practicable

railroad, as surveyed by Governor Stevens.' On the 9th of March, 1865, the then Secretary of the Interior, Mr. Upsher, addressed to the Commissioner of the General Land Office the following letter:

"'DEPARTMENT OF THE INTERIOR.

"'WASHINGTON, D. C., *March 9th, 1865*

"'SIR: Herewith I transmit a map upon which the "general line" of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3d and 6th sections of the act of Congress approved July 2, 1864 (Pamphlet Laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

"'Very respectfully, your o'bt servant,

"'J. P. UPSHER, *Secretary.*

"'The Commissioner of the General Land Office.'

"Mr. Harlan having, shortly after, succeeded Mr. Upsher as Secretary of the Interior, the Commissioner of the General Land Office, on June 22, 1865, addressed to him a letter, stating, in substance, that Secretary Upsher had, under date of March 9, 1865, sent to the General Land Office a diagram showing the proposed route of the Northern Pacific Railroad Company, which diagram had been filed in the Secretary's office, accompanied by a request for the withdrawal of the land along such

route; that, as no withdrawal had been ordered by Secretary Upsher, no action was taken in the General Land Office upon the application, and that as Mr. Perham, president of the company, had called attention to the matter, the Commissioner, while proceeding to state objections to the diagram, and his reasons for thinking no withdrawal for the benefit of the company should be made, asked for such directions as the Secretary should deem proper in the premises. Among the objections urged by the Commissioner was this: That the diagram presented to and filed with the Secretary did not constitute such a map of the general route of the proposed road as was required by law and the rules of the Land Department. That these required 'a connected map showing the exact location; the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee.' And that, in the judgment of the Commissioner, no withdrawal should be ordered until such a map is filed in the General Land Office. These views of the Commissioner, so far as the record shows, were acquiesced in by the Secretary of the Interior, as well as by the Northern Pacific Railroad Company; for nothing further, so far as appears, was ever done with or under the Perham map or diagram.

"On the 25th of July, 1866, Congress made a grant to the Oregon & California Railroad Company, in aid of the construction of a line of railroad and telegraph beginning at the city of Portland, Oregon, and extending thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of that State, there to connect with a line of railroad and telegraph to be built from a point on the Central Pacific Railroad, in the Sacramento Valley, in California, to the point of connection at the Oregon line. (14 Stat., 239.)

The grant was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections of land per mile (10 on each side) of the designated line, with the provision usually found in such grants, for the selection of indemnity lands within defined limits for such sections, or parts of sections, within the primary limits, as shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of. On October 29, 1869, the Oregon and California Railroad Company duly filed in the office of the Commissioner of the General Land Office its map of definite location, showing that portion of the surveyed line it was by the act of July 25, 1866, authorized to build from Portland southerly to the California boundary, and extending beyond and opposite the lands here in controversy. The map so filed was accepted, and by direction of the Secretary of the Interior the Commissioner of the General Land Office, on the 31st day of January, 1870, ordered the withdrawal, for the benefit of the Oregon & California Railroad Company, from sale or location, pre-emption, or homestead entry, all the odd-numbered sections within 20 and 30 miles of the designated line of road. The Oregon & California Railroad Company proceeded to construct the road along the line so designated, and having completed it, it was inspected by commissioners appointed for the purpose by the President; and, having been found by him to have been constructed in accordance with the terms of the grant, patents were afterwards, and prior to the commencement of this suit, issued to the Oregon & California Railroad Company for the lands in controversy. Nothing was done by the Northern Pacific Railroad Company under its grant, except the filing of the Perham map or diagram, together with the accompanying letter of the president of that company, and his request for the withdrawal of the lands

along its line for its benefit, prior to the definite location of the route of the Oregon & California Railroad Company on October 29, 1869. In the year following, to wit, May 31, 1870, Congress passed a Joint Resolution, by which among other things, the Northern Pacific Railroad Company was authorized—

> " 'To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points.' (16 stats., 378.)

"By this resolution, as said by Mr. Secretary Lamar in Railroad Co. *v.* McRae (6 Land Dec., Dep. Int., 400)—

> "'The designations of the lines of the road were changed. That which by the granting act was known as the "branch line" (via the valley of the Columbia River to a point at or near Portland, in the State of Oregon) was changed to "main road" or "main line," and that which had been designated as "main line' (across the Cascade Mountains to Puget Sound) was changed to "branch line." So, by the Joint Resolution of 1870 (May 31st), the company was authorized to locate and construct its main line via the Columbia River, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in the act of incorporation.'

"After the passage of the Joint Resolution of May 31, 1870, to wit, on August 4, 1870, two maps, designating the general route of its road, were filed by the Northern Pacific Railroad Company in the General Land Office, upon which orders of withdrawal of the lands along the line indicated thereby were made, respectively, August 13, 1870, and October 27, 1870, within the limits of which withdrawals are the lands afterwards patented to the Oregon & California Railroad Company, and here involved. The Northern Pacific Railroad Company never filed any map of definite location of the line it was authorized to build opposite the lands in controversy, and never built such line; and, for its failure in this respect, Congress, by the act of September 29, 1890 (26 Stat., 496), forfeited whatever rights, if any, the company had to the lands here in question, and by the present suit the Government seeks to cancel the patents therefor, which were issued to the Oregon & California Railroad Company.

"That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear, for the forfeiture declared was for the benefit of the Gov-

ernment only. (U. S. *v.* Southern Pac. R. Co., 146 U. S., 570; 13 Sup. Ct., 152.) And if the grant to the Northern Pacific Railroad Company ever attached to the lands in controversy, or if they were withdrawn from the mass of the public lands for the benefit of that company at the time the grant to the Oregon & California Railroad Company became effective, it is clear that they were not embraced by that grant, and that the patents therefor should be annulled. The real question in the case, therefore, is, Did the lands in question ever become affected by any grant to the Northern Pacific Railroad Company? If they were public lands, not mineral, and not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, at the time of the grant to the Oregon & California Railroad Company, and at the time of the filing of the map of definite location of the route of that company's road along and opposite to them, it is obvious that they would be embraced by the grant to that company, and can not be affected by any grant contained in the subsequent Joint Resolution of Congress of May 31, 1870. That resolution, as held by the Supreme Court in the case entitled U. S. *v.* Northern Pac. R. Co. (152 U. S., 284, 294, 297; 14 Sup. Ct., 598, 602, 603), contained a new grant to the Northern Pacific Railroad Company, but did not embrace any public land disposed of after the passage of the act of July 2, 1864. The Joint Resolution of May 31, 1870, and the proceedings taken thereunder by the Northern Pacific Railroad Company have therefore no bearing whatever on the question in this case, and the effect given by the court below to the maps filed by the Northern Pacific Railroad Company under and pursuant to the provisions of that resolution constitutes one of the errors into which the court below fell in its consideration and decision of the case.

"The only thing remaining in the case that could take the lands in controversy out of the mass of public lands

to which the grant of 1866 to the Oregon & California Railroad Company applied, is the preceding grant to the Northern Pacific Railroad Company of July 2, 1864, and the Perham map or diagram filed thereunder. It is not pretended that any order of withdrawal was made by any officer of the Land Department based on that map. Was it sufficient, taken in connection with the act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Company? It was not, for at least two very substantial and obvious reasons. Upon its face, as well as by the letter accompanying it, from the president of the Northern Pacific Railroad Company, of date March 6, 1865, it purported to be a designation of the general route of a railroad from a point on Lake Superior, in the State of Wisconsin, via the valley of the Columbia River, to Puget Sound, in the State of Washington, which the letter of its president stated the company had adopted as the line of its road. This was not the line the Northern Pacific Railroad Company was authorized by the act of July 2, 1864, to locate and build. The line authorized by that act, and in aid of which that grant was made, extended, as has been seen, from a point on Lake Superior, in the State of Minnesota or Wisconsin, westerly, by the most eligible railroad route, on a line north of the forty-fifth degree of latitude, and within the territory of the United States, to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon; leaving the main trunk line, at the most suitable place, not more than 300 miles from its western terminus. (13 Stat., 365; U. S. *v.* Northern Pac. R. Co., 152 U. S., 284; 14 Sup. Ct., 601.) As said by the Supreme Court in the case just cited—

> "'Although that act allowed the company to adopt the most eligible route, within the territory

> of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending "via the valley of the Columbia River to a point at or near Portland." If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country, north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co. *v.* Northern Pac. R. Co. (139 U. S. 1, 13; 11 Sup. Ct., 389–393), "when the termini of a railroad are mentioned for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." '

"The indefiniteness of the Perham map or diagram, which is so manifest on its face, was alluded to by the Supreme Court, in the same case (152 U. S., 292; 14 Sup. Ct., 601), in these words:

> " 'It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted by the Interior Department.'

"So it was, as has already been shown. The fact that upon its face it did not purport to be anything more than a mere sketch or diagram, unauthenticated by any engineer or officer charged with the duty of designating such a route, coupled with the fact that it was not only not accepted, but was rejected, by the Land Department of the Government, as insufficient to properly designate the general route of the road the company was by the act of Congress authorized to build, constitutes a second reason why the granting act did not itself operate to withdraw the lands in controversy for the benefit of the Northern Pacific Railroad Company. They, therefore, remained public lands, to which the subsequent grant to the Oregon & California Railroad Company might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee, the Northern Pacific Railroad Company, operated to withdraw the lands in controversy from the mass of public lands. And, if these lands, why not all other public lands within the territory of the United States, situated north of the forty-fifth degree of latitude, and between the termini named in the act? It would be difficult to maintain any distinction in this respect between any of the public lands, not mineral, situated in the immense belt through and along which the Northern Pacific Railroad Company might have located and constructed its road.

"The court below, in its opinion, held that:

> "'It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power.'

"In holding that it is unimportant that the Northern Pacific Railroad Company never exercised its right to

locate and build its road along and opposite to the lands in controversy, the court below committed its second error. It is said that the grant contained in the act, in and of itself, was an 'an appropriation of the public lands.' Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Company was authorized to locate and build its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant, in and of itself, operated as an appropriation of any particular land, it operated as an appropriation of all public lands within the United States situated north of the forty-fifth degree of latitude, and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route, no distinction can be made between any of the public lands not mineral, situated in the belt through and along which the Northern Pacific Railroad Company might have located and constructed its road. Is it possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of U. S. *v.* Southern Pac. R. Co. (146 U. S., 570; 13 Sup. Ct., 152), the Supreme Court said that the intent of Congress in all railroad land grants, as has been declared by that court again and again, was that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands. And in respect to this very grant of July 2, 1864, the Supreme Court, in the case of U. S. *v.* Northern Pac. R. Co. (152 U. S., 296; 14 Sup. Ct., 598, 603), in express

terms declared that it embraced only public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time its line of road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. As it is not pretended that any such line, in so far as concerns the lands here in controversy, ever was definitely fixed, how that grant, in and of itself, without any designation of the required route, can be held to embrace these lands, we are unable to understand. It requires an act of the grantee to give precision to such grants, and to identify by the location of its road the lands embraced by the grant. When that is properly done, the grant attaches thereto, and becomes effective as of its date; but, until there is some designation of route by the grantee, there is nothing to segregate any particular land from the mass of public lands, and manifestly, if such segregation never occurs, those that otherwise might be covered by the grant remain public lands, and subject to any other valid grant that Congress may have made embracing them. The grant of July 2, 1864, to the Northern Pacific Railroad Company never having taken effect, so far as concerns the lands in controversy in this suit, they were public lands at the time of the grant to the Oregon and California Railroad Company, and at the time of the definite location by that company of the road it was authorized to build along and opposite to them; and falling as they do within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed and the cause remanded, with directions to the court below to dismiss the bill."

Second.

There is another reason why the Eastern Oregon Land Company (the appellant) is entitled to recover in this suit, but which was not considered by the Circuit Court of Appeals because it was not deemed necessary. The grant to the State of Oregon was for Public Uses.

Was not the grant to the State of Oregon made by the act of February 25, 1867, excepted from the grant to the Northern Pacific?

The only exceptions in the grant to the State were of lands theretofore—that is, prior to February 23, 1876—"reserved to the United States or otherwise appropriated by act of Congress or other competent authority." The grant to the Northern Pacific Railroad Company was of lands on the line of its road to which the United States should have "full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

The United States expressly reserved the right *to grant* lands at any time prior to the filing of the map of definite location of the railroad company's line with the Commissioner of the General Land Office, and expressly excepted the lands it *should grant* prior to that time from the railroad company's grant.

We contend that the grant to the State of Oregon was made in pursuance of and in accordance with this reservation of the right of the United States to grant lands,

though they might be found upon the filing of the map of general location of the route of the Northern Pacific Railroad Company's road to be embraced within the limits of the grant to that company, and that lands so granted were expressly reserved from the said company's grant.

In cases of conflicting grants to different railroad companies, the Interior Department, prior to 1878, held that the company which first definitely fixed the line of its road acquired title to the land within overlapping limits. In the case of Oregon & California R. R. Co., (14 L. D., 188), the Secretary of the Interior says: "Under the rulings in force in this Department prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon & California Company within the conflict now under consideration."

It was while this construction prevailed that the grant of land in controversy was made to the State of Oregon to aid in the construction of a military road. And the strong probability is that Congress then held the same view as the Department of the Interior. Up to that time the Supreme Court had expressed no opinion upon the subject.

In 1878 the decision of the Supreme Court was rendered in the case, Missouri, Kansas, etc. *v.* Kansas Pacific, etc. (97 U. S., 492).

In that case, the court was construing the third section of the act of Congress of July 1, 1862, granting

lands to the Union Pacific Railroad Company, in these words:

"That there be, and is hereby, granted to the said company every alternate section, to the amount of five alternate sections, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said map is definitely fixed."

In delivering the opinion of the court, Mr. Justice Field says:

"The grant was in the nature of a float, and the reservation excluded only specific tracts to which certain interests had attached before the grant had become definite or which had been specifically withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the Government. *It was not within the language or purpose to except from its operation any portion of the designated lands to aid in the construction of other roads.*"

Afterwards, in delivering the opinion of the court in St. Paul & Pacific *v.* Northern Pacific (139 U. S., 1), Justice Field says:

"But independently of this conclusion, we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself." (Missouri, Kansas & Texas Railway *v.* Kansas Pacific Railway, 97 U. S, 491, 498, 499.)

The quotations from these two decisions seem to hold that priority in the definite location of a railroad did not give priority of right to lands within conflicting limits. This reversed the rulings of the Land Department in that respect, which had prevailed until 1878.

In neither of these cases was it necessary for the court in coming to a decision to make these declarations. Both of them were decided upon other grounds and for other reasons. In fact, they seem to be mere *obiter dicta*.

But conceding that the rule here laid down by the Supreme Court is correct so far as it concerns grants to different railroad companies, it does not follow that a grant to the State of Oregon to aid in the construction of the Dalles Military Road shall not have priority of right over the grant to the Northern Pacific Railroad Company.

The Supreme Court says, in 139 U. S., 17 (*supra*):

"We are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads *of a similar character*."

But the Northern Pacific Railroad and the Dalles Military Road are in no sense roads of a similar character. The former is a road belonging to a private corporation, and for its especial benefit. The latter is a public road of the United States, constructed for public uses, and especially for the benefit of the United States.

Military roads have always been constructed at the expense of the United States, and are in the fullest sense *public roads of the United States*.

An examination of the statutes of the United States will show that for several years preceding the civil war, a number of military roads were constructed at great expense by the United States within Oregon and Washington Territories.

By act of Congress of February 17, 1855 (10 Stats. at Large, 608), $30,000 was appropriated to construct a military road from Astoria to Salem.

On March 2, 1857 (11 Stats., 168), $10,000 additional was appropriated.

On June 2, 1858 (11 Stats., 337), $30,000 additional was appropriated to complete the same.

By act of February 6, 1855 (10 Stats., 603) $25,000 was appropriated to construct a military road from The Dalles of the Columbia to Columbia Barracks, and $30,000 to construct a military road from Columbia Barracks to Fort Steilacoom, in Washington Territory.

By act of March 3, 1859 (11 Stats., 434), $100,000 was appropriated to construct a military road from Fort Benton to Walla Walla (known as the Mullan Road).

All these roads, besides others in Oregon and Washington, were constructed under direction of the Secretary of War. They were public and not private roads, and deemed necessary for the protection of the country and to facilitate the movement of troops and munitions of war.

It is a matter of history, of which the court will take notice without proof, that in 1862 extensive gold mines were discovered in what is now known as Canyon City, and conflicts were constantly occurring between the miners and Indians in the vicinity. Troops were sent

to protect the people who had gone thither. Permanent military camps were established at Camp Watson, Camp Harney, and Camp Logan, the former on the trail leading from Dalles City to Canyon City, and the others in the neighborhood of the diggings. There was at the time no road within fifty miles of these military posts, and all supplies had to be transported by pack trains from Dalles City.

Petitions were sent to Congress asking for the construction of a military road from Dalles City to these new diggings, and the result was that Congress passed the act of February 25, 1867 (14 Stats., 409), granting lands to the State of Oregon to aid in the construction of a military road from Dalles City to Snake River. This is the grant which was subsequently transferred by the State to the Dalles Military Road Company, and a part of which is now in controversy in this suit.

Instead of appropriating the money, Congress appropriated certain sections of land to aid in the construction of this military road; but, all the same, this was as much of a *public road* as was the Astoria and Salem Military Road before referred to.

Section 2 of the act granting lands to aid in the construction of the Dalles Military Road provides that "the said road shall be and remain a *public highway* for the use of the Government of the United States, *free from tolls* or other charges upon the transportation of any property, troops, or mails of the United States."

The grant to the State was of the odd-numbered sections, to the extent of three sections in width on each side of said road. As we have said, the only reservation

from the operation of this grant was such land as had heretofore been reserved to the United States or "otherwise appropriated by act of Congress."

The grant to the Northern Pacific Railroad Company was a conditional one, and that company had no interest whatever in it until the definite location of its road. The land was in no sense *appropriated by act of Congress.* It was not intended by Congress in making the grant to the Northern Pacific Railroad Company to withhold any part of these lands from subsequent appropriation, sale, or grant, for public uses, before the line of its road was definitely fixed.

As was said by Mr. Justice Field, in Missouri, etc., Ry. Co. *v.* Kan. Pac. Ry. Co. (97 U. S., 498, *supra*):

"As the sections mentioned could only be known when the route of road was established, which might not be for years, the Government did not intend to withhold the lands in the meantime from occupation and sale, and thus retard the settlement of the country, nor *exclude the land from appropriation for public uses.*"

This is an explicit declaration that the Government reserved the right to appropriate the land in the grant to the Northern Pacific Company, to *public use*, prior to the time when that company should definitely fix the line of its road.

In the act granting lands to the State of Oregon, the fifth section is as follows:

"SEC. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior

that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States."

The commencement point of the military wagon road was "Dalles City, on the Columbia River," a point within the limits of the grant to the Northern Pacific Company, and the road was necessarily required to run many miles in a southeasterly course through the grant to that company.

As before stated, the public exigency was such that an early construction of the road was required, and five years only given in which to complete the entire road.

In order to provide the means of construction, the fifth section of the act above quoted says that "when the governor of the State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land not exceeding thirty sections may be sold, and so on, from time to time, until said road is completed."

Did Congress intend that a sale of the land under these circumstances should convey a good title to the purchaser? Surely it was not intended to be a delusive sale, and that the vendee took nothing by his purchase of the land!

Congress evidently recognized the validity of the grant to the State of Oregon for the land in controversy when it adopted the Joint Resolution of May 31, 1870,

(16 Statutes at Large, 378), which, among other things, provided as follows:

"And in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land, belonging to the United States, and designated by odd numbers in such state or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864."

Congress here provided that the Northern Pacific Railroad Company should have ten additional miles on each side of its road, in which to select lands in lieu of those granted to the State of Oregon, and which had then been withdrawn from sale in behalf of the Dalles Military Road Company.

Third.

There is still another reason why the Eastern Oregon Land Company (the appellee) should recover in this suit, but which was not considered by the court below.

The appellee was a bona-fide purchaser of the land in controversy, and is protected in its rights by the act of March 2, 1896. (29 Stats., 42.)

On June 23, 1869, the Governor of Oregon certified that the road of the Dalles Military Road Company, extending from Dalles City to Snake River, was constructed according to the requirements of the act of Congress approved February 25, 1867. By the fifth section of the act the governor was authorized to make this certificate, as evidence that the company had completed the road and was entitled to the land, including that in dispute.

On December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections within three miles from each side of the road in favor of the Dalles Military Road Company.

On June 18, 1874, Congress passed the following act in relation to land grants to aid in the construction of military wagon roads in Oregon:

"An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases.

"Whereas certain lands have heretofore by acts of Congress been granted the State of Oregon to aid in the construction of certain military wagon roads in said

State, and there exists no laws providing for the issuing of formal patents for said lands: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled.

"Approved June 18, 1874."

18 U. S. Stat., 80.

On May 31, 1876, Edward Martin, a resident of San Francisco, Cal., having confidence in the truth of the certificate of the Governor of Oregon that the road had been duly constructed, and placing confidence in the order of the Commissioner of the General Land Office withdrawing the lands from sale in favor of the Dalles Military Road Company, and also believing that the act of Congress of June 18, 1874, would be carried into effect by issuance of the patents for the land, purchased these lands in good faith, for the sum of $125,000, from the Dalles Military Road Company.

On August 11, 1884, all these lands, by sundry mesne conveyances from Edward Martin, became vested in the Eastern Oregon Land Company, the appellee.

In August, 1889, a suit was commenced by the United States against the Dalles Military Road Company and the Eastern Oregon Land Company (the appellee) in the United States Circuit Court for the District of Oregon, to declare forfeited to the United States the land granted to the State of Oregon under the act of February 25, 1867. This was in pursuance of an act of Congress of March 2, 1889, providing in certain cases for the forfeiture of wagon-road grants to the State of Oregon, but "saving and preserving the rights of all *bona-fide* purchasers, if any there be."

The Eastern Oregon Land Company filed a plea that it was a *bona-fide* purchaser of the land for a valuable consideration.

This plea was sustained by the Circuit Court and the Circuit Court of Appeals, and the case was appealed by the United States to the Supreme Court, and this court affirmed the decisions of the courts below. (United States *v.* The Dalles Military Road Company *et al.*, 148 U. S., 49.)

The case was decided at the same time and for the same reasons as United States *v.* California, etc., Land Company (148 U. S., 31).

The claim of the appellee as a *bona-fide* purchaser of the land in controversy can not now be questioned; it is *res adjudicata*.

The Supreme Court has decided that—

"The right to a patent once vested is equivalent, as

respects the Government dealing with the public lands, to a patent issued."

Stark *v.* Starrs, 6 Wall., 402.

And as the act of June 18, 1874, just quoted, directed that patents should be issued in all cases where the certificate of the governor showed the completion of the wagon road, we claim that the lands in controversy, so far as the Government is concerned, are virtually patented lands, and that the appellee has an indefeasible title.

The act of Congress of March 2, 1896 (29 Stat., 42), providing for the time when suits may be brought to vacate patents, contains this provision in section 1: "But no patent to any lands held by a *bona-fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Admitting, however, that in the technical sense the lands were not patented lands, yet they were lands certified by the Commissioner of the General Land Office on December 18, 1869, to the State of Oregon, for the benefit of the Dalles Military Road Company.

In United States *v.* Winona & St. Peter Railroad Company (165 U. S., 481), the Supreme Court says:

"Our conclusion is that these acts (March 3, 1887, and March 2, 1896) operate to confirm the title to any purchaser from a railroad company of lands *certified* or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the facts that the lands so certified or patented were, by the true construction of the land grants, excepted from their operation, providing that he purchased in good faith, paid value for the

lands; and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

If a suit should be brought by the United States against the Eastern Oregon Land Company to recover the lands claimed by it, we think it would not be possible to maintain such suit, and that the court would confirm the title to the company.

In section 2 of the act of March 2, 1896, there is this provision:

"And if such claimant, or one claiming to be a *bona-fide* purchaser (of lands erroneously patented or *certified*), but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona-fide* purchaser, the court shall decree a confirmation of the title," etc.

But this court has already declared the Eastern Oregon Land Company to be a *bona-fide* purchaser—it is *res adjudicata*. (148 U. S., *supra*.)

So, in any suit between the United States *v.* the Eastern Oregon Land Company, its title is secure and will stand confirmed.

How, then, can the Commissioner of the General Land Office take away the title of the appellee and give it to the appellant?

When the appellant made application to purchase the land in controversy, he well knew that it was claimed by the appellee as successor and assignee of the Dalles Military Road Company, and was a *bona-fide* purchaser thereof.

Fourth.

If any lands were excepted from the grant to the State on account of the Northern Pacific Railroad Company's grant, was such exception of lands in the State of Oregon ten or twenty sections to the mile?

The grant is of "every alternate section of public land not reserved, designated by odd sections, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten sections of land on each side of said railroad whenever it passes through any State."

We think the intention of Congress to grant to the Northern Pacific Railroad Company ten sections of land only on each side of the road within a State is apparent from the terms of the grant, and that the extent of the grant to that company depends upon the location of the land. By the express terms of the statute, if the road passes through a State the grant is limited to ten sections to the mile on each side of the road. The words, "through the Territories of the United States," we think may be read as referring to the grant; but if they refer to the line of the road which the company might adopt, still it may be held, without doing violence to the language employed, that where the line is located in a Territory, the grant within a State is limited to ten sections to the mile.

Congress must have had some reason for making the grant in a Territory double that in a State. Lands within a State might fairly, on account of a larger and denser population and older communities and better development of the country, be presumed to be of greater value than lands in a new Territory. It was the location of the lands and not the location of the road, therefore, that must have controlled Congress.

It can hardly be possible that it was the intention of Congress to grant to the company twenty sections of land to the mile within a State if the company should choose to locate its road, as in the present case, within a Territory, but immediately along the boundary line between a State and a Territory.

A long-established rule of construction of such grants is that they will be construed strictly and not extended by implication beyond their natural import.

United States *v.* Arrendo, 6 Pet., 699;
Jackson *v.* Lampshire, 3 Pet, 280–9;
Beatty *v.* Knowler, 4 Pet., 52;
Charles River Bridge Co. *v.* Warrer Bridge, 11 Pet., 422;
Griffing *v.* Giib, 1 McAl., 211.

Grants of land by acts of Congress to aid in the construction of a railroad should be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language.

Dubuque, etc., R. R. Co. *v.* Litchfield, 23 How., 66–88.

If the construction of the grant to the Northern Pacific Railroad Company we contend for can be given to the statute, it should be adopted by the court.

JAMES K. KELLY and
NIXON & DOLPH,
Solicitors for Appellees.

such plat or map had been duly filed in his office, and that it showed the route upon which the road was constructed in accordance with the above acts of Congress and of the legislature of Oregon; also, that he had made a careful examination of the road since its completion, and that the same had been built in all respects as required by those acts and had been accepted.

The above map and the certificate of the Governor were filed by the company in the office of the Secretary of the Interior, and on December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company the odd-numbered sections within three miles from each side of the wagon road as delineated and shown on the maps so filed.

By an act of Congress approved June 18, 1874, it was provided that "in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Orgeon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled." 18 Stat. 80, c. 305.

On the 31st day of May, 1876, Edward Martin, in good faith and for a valuable consideration, $125,000, purchased from the Military Road Company all the lands embraced in the grant to it, except such as it had previously sold, and received a conveyance thereof. Bad faith is not imputed to Martin, and it is only claimed that when he purchased those lands he was chargeable with constructive notice of the acts of Congress, and that no title could pass to the Military Road Company

consistently with the above act of July 2, 1864, granting lands to the Northern Pacific Railroad Company.

By different mesne conveyances, beginning with a deed from Edward Martin dated January 31, 1877, and ending with a conveyance to it of date August 11, 1884, the Eastern Oregon Land Company, a California corporation, became the owner — if the original sale by the Military Road Company passed any title — of all the lands purchased by Martin in 1876.

Among the lands in place that had been selected by the Military Road Company were the northeast quarter and the southeast quarter of section fifteen in township five south of range seventeen east of the Willamette meridian, which was situated in Sherman County, and within the limits of the grant of land in place to the State by the above act of February 25, 1867. That particular body of land was on the south side of the line of "general route" of the Northern Pacific Railroad as delineated on a map filed by that company on the 13th day of August, 1870, and more than twenty and less than forty miles from that line. There never was any definite location of the line of that road opposite this land.

The above tract of land was opened for settlement and sale by the Secretary of the Interior — that officer, the bill alleged, being of opinion that it was excepted from the grant to the State of Oregon in the act of February 25, 1867, and was embraced by the act of July 2, 1864, and by the map of general route filed by the Northern Pacific Railroad Company on the 13th day of August, 1870. In opening this land to settlement and sale the Secretary proceeded, as he supposed, by authority of the forfeiture act of September 29, 1890, by which the United States resumed title to and restored to the public domain all lands theretofore granted in aid of the construction of railroads and which were opposite to and coterminous with the portion of the railroad not then completed and in operation, for the construction or benefit of which such lands were granted. 26 Stat. 496, c. 1040.

Thereupon John D. Wilcox settled upon the particular land above described, and made application to purchase the same under the act of Congress of April 24, 1820, making further

WILCOX *v.* EASTERN OREGON LAND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 23. Submitted November 15, 1897. — Decided January 8, 1900.

The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company.*

THE facts are stated in the opinion. The case was submitted November 15, 1897, and was, on the 29th of the same month, postponed until *The United States* v. *Oregon & California Railroad Co.*, *ante*, 28, should be heard.

Mr. John M. Geavin for appellant.

Mr. James K. Kelly for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case depends in part upon the construction of the act of Congress of July 2, 1864, 13 Stat. 365, c. 217, in aid of the

provision for the sale of public lands. 3 Stat. 566, c. 51. Such proceedings were thereafter had on his application that the President on the 28th of September, 1884, issued a patent to him for that tract. Of the application of Wilcox for the purchase of the land, the Eastern Oregon Land Company had no notice, and therefore, even if its title were not good, it could not have availed itself of the privilege given by the act of Congress of March 3, 1887, 24 Stat. 556, c. 376, to purchase the land.

The present suit was brought against Wilcox by the Eastern Oregon Land Company in the Circuit Court of the United States for the District of Oregon. The bill alleged that a patent having been issued to Wilcox, the Interior Department had no longer jurisdiction to give to it a patent as required by the above act of June 18, 1874, until the patent to the defendant has been cancelled and set aside. As the patent to Wilcox was therefore a cloud upon its title, the plaintiff sought a decree setting it aside, declaring the company to be the owner of the land in Wilcox's possession, and ordering the defendant to convey the land to it. The Circuit Court dismissed the bill. Upon appeal to the Circuit Court of Appeals that decree was reversed, and a decree ordered to be entered in favor of the Land Company. Thereupon Wilcox appealed to this court.

We adjudge, as in *United States* v. *Oregon & California Railroad Company*, just decided, that the act of July 2, 1864, relating to the construction of the Northern Pacific Railroad, only granted lands that were *not* reserved, sold, granted or otherwise *appropriated*, and free from preëmption or other claim, or rights, at *the time the line of that road* was *definitely fixed* and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of the *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of "definite location," and that such lands, if not otherwise identified at the date of the passage of the later act than by a plat or map of "general

route," were not excluded from the operation of such an act as lands previously "reserved, sold, granted or otherwise appropriated" by the act of 1864.

As the lands here in dispute are embraced by the granting clause of the act of February 25, 1867, giving lands to the State of Oregon, and are within the lines of the definite location of the Dalles Military Road as shown by its map filed in the Land Department and approved by that department December 18, 1869, and as the route of the Northern Pacific Railroad Company was not then and was not thereafter definitely fixed opposite the lands in dispute, they were earned and appropriated by the Military Road Company under the act of February 25, 1867, and cannot be regarded as embraced by the act of July 2, 1864, for the benefit of the Northern Pacific Railroad Company, which could take under its grant *only* such lands as had *not* been appropriated under the authority of Congress when its line was definitely fixed.

This conclusion is inevitable, unless it be adjudged that it was beyond the power of Congress to appropriate for the Dalles Military Road lands within the general route but not within any line of definite location established by the Northern Pacific Railroad. For the reasons stated in *United States* v. *Oregon & California Railroad*, we cannot so adjudge.

Upon the authority of that case the decree of the Circuit Court of Appeals in this case, reversing the decree of the Circuit Court with instructions to enter a decree in favor of the plaintiff, the Eastern Oregon Land Company, is

Affirmed.

MR. JUSTICE MCKENNA did not participate in the decision of this case.

MESSINGER *v.* THE EASTERN OREGON LAND COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 24. Submitted November 15, 1897. — Decided January 8, 1900.

The judgment in this case affirmed upon the authority of *United States* v. *Oregon and California Railroad Company* and *Wilcox* v. *The Eastern Oregon Land Co.*

THE case is stated in the opinion. This case was submitted with *Wilcox* v. *Eastern Oregon Land Co.*, *ante*, 51, and a like disposition was made of it.

Mr. John M. Gearin for appellant.

Mr. James K. Kelly for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The parties in this case and in *Wilcox* v. *Eastern Oregon Land Company* stipulated that the bills, answers, decrees, assignments of error, and all other papers and proceedings in both causes, were exactly alike, with the exception that in this case it is alleged that the land patented to the defendant Messinger was patented under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," 12 Stat. 392, c. 75, and the acts supplemental thereto; that the lands patented were the south half of the northwest quarter and lots three and four of section three, township two south, of range sixteen east of the Willamette meridian, in Oregon, and were situated within twenty miles of the line of the general route of the Northern Pacific Railroad Company's road as designated on its map of August 17, 1870, and that the patent was dated the 17th day of August, 1894.

It is also stipulated by the parties to the two suits, by their

Counsel for Parties.

respective attorneys, that, unless this court otherwise ordered, only the record in the Wilcox suit should be printed, and that the appeal in this case might be heard and submitted without printing the record thereof.

Upon the authority of *United States* v. *Oregon & California Railroad Company* and *Wilcox* v. *Eastern Oregon Land Company*, just decided, the decree of the Circuit Court of Appeals, reversing the judgment of the Circuit Court and directing a decree in favor of the plaintiff, the Eastern Oregon Land Company, is *Affirmed.*

Mr. Justice McKenna did not participate in the decision of this case.